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## Special Court for Sierra Leone: Achieving Justice?

Charles Chernor Jalloh  
*University of Pittsburgh School of Law*

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# SPECIAL COURT FOR SIERRA LEONE: ACHIEVING JUSTICE?

*Charles Chernor Jalloh\**

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\* B.A. (Guelph), LL.B., B.C.L. (McGill), M.St. and Chevening Scholar (Oxford); Assistant Professor of Law, University of Pittsburgh School of Law, Pennsylvania, United States of America; former Legal Advisor to the Office of the Principal Defender, Special Court for Sierra Leone, Associate Legal Officer, United Nations International Criminal Tribunal for Rwanda and Legal Counsel, Crimes Against Humanity and War Crimes Section, Canadian Department of Justice. E-mail: jallohc@gmail.com.

This Article was prepared for a debate between former Special Court for Sierra Leone Prosecutor David Crane and this author on the above question. It was hosted by the Human Rights Center and the Baldy Center for Law and Social Policy, State University of New York at Buffalo Law School on February 17, 2010. Vincent del Buono, a fine human rights advocate, moderated. He has since passed away. I dedicate this Article to his memory.

I thank Tara Melish for organizing and inviting me to the above student-focused event, which prompted the drafting of this paper. I am grateful to Erika de Wet and Joseph Rikhof for kindly reviewing an earlier draft of this Article and giving excellent suggestions. Amy DiBella provided outstanding research assistance. I appreciate Jennifer Allen and the editors of the *Michigan Journal of International Law* for their thoughtful edits. The usual disclaimer applies.

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## INTRODUCTION

The creation of the Special Court for Sierra Leone (SCSL or the Court) in early 2002 generated high expectations within the international community.<sup>1</sup> The SCSL was generally deemed to herald a new model or benchmark for the assessment of future ad hoc international criminal courts.<sup>2</sup> As the Court completes the trial of former Liberian President Charles Taylor in The Hague—its last—nine years later, this Article offers an early and broad assessment of whether it has fulfilled its promise.

More specifically, this Article examines whether the SCSL has achieved, or more accurately—because its trials are still ongoing—whether it is *achieving* justice. I use the term justice in the ordinary sense, referring to whether the Court has justly or fairly treated the accused during the proceedings it has carried out. This approach is justified for three main reasons. First, dispensing *credible justice* on behalf of Sierra Leonean victims of conflict is a noble goal that was the *raison*

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1. See, e.g., Stuart Beresford & A.S. Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN J. INT'L L. 635 (2001) (maintaining optimism regarding the Court despite the numerous hurdles facing it); Robert Cryer, *A "Special Court" for Sierra Leone*, 50 INT'L & COMP. L.Q. 435 (2001) (comparing the origins of the Court relative to other attempts at creating similar institutions); Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391 (2001) (claiming that the Court, by virtue of its relationship with the United Nations, will be perceived as more legitimate than purely domestic courts); Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 E.J.I.L. 857, 869 (2000) ("[T]he establishment of the Special Court represents another positive step in the struggle against impunity."); Melron C. Nicol-Wilson, *Accountability for Human Rights Abuses: The United Nations' Special Court for Sierra Leone*, AUSTL. INT'L L.J. 159, 175 (2001) ("The importance of establishing the Special Court is unquestionable and Sierra Leoneans and the international community are anxious to see a viable and effective court functioning as soon as possible."); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002) (expressing optimism in the Court when compared to the International Criminal Tribunal of Rwanda (ICTR) and International Criminal Tribunal of Yugoslavia (ICTY)).

2. See Independent Expert, *Report on the Special Court for Sierra Leone*, ¶ 34 (Dec. 12, 2006) (Antonio Cassese) ("[T]he Special Court has in some respects made much headway, establishing a new benchmark for international criminal justice. On the other hand, the Court has also experienced a number of challenges and setbacks . . .").

*d'être* for the SCSL's creation. Second, since the Court is an international tribunal entrusted with such a sacred mandate and whose creation and functioning was supported by many states from around the world, it seems only fair to hold it to the high international fair trial standards that its statute claims to espouse. Third, the SCSL's success was, from its founding, predicated on the idea that it would not only dispense justice but that it would be *seen to do so* and contribute to laying a firm structural foundation for lasting peace and national reconciliation in post-conflict Sierra Leone. An inevitable question then is whether it has met that expectation.

The Article is divided into four parts. Part I examines the *travaux préparatoires*, or documentary history, of the Court to discern the tribunal's intended role in order to set the stage for the subsequent analysis. I focus on the views of Sierra Leone and the United Nations during the formal discussions and negotiations preceding the SCSL's establishment. Part II provides some necessary background. Towards that end, I briefly highlight the three main trials that the Court has completed as well as the current status of its fourth and, by all indications, last trial, that of former Liberian President Charles Taylor.

In Part III, I examine some limitations relating to the SCSL from a Sierra Leonean perspective, starting with the Prosecutor's selection of cases. I question the excessively narrow manner in which he framed and applied the Court's greatest responsibility personal jurisdiction. In this regard, I ask who was prosecuted, who was *not* prosecuted, and why or why not. Though I do not purport to have all the answers, my analysis does reveal a curious, inverse, and unexpected result: over-inclusiveness with respect to those who were actually prosecuted and under-inclusiveness in relation to those who were not. In seeking to understand this outcome, I suggest that the SCSL's volatile donations-based funding structure severely limited the number of cases brought by the Prosecution. Perhaps worse, it also negatively impacted the funding and other types of support provided for the accused and their defense.

Part IV of the Article critically assesses how well the Court has done in achieving the tripartite goals of its founders to help bring justice, restore peace, and promote national reconciliation in Sierra Leone. Finally, in the Conclusion, I make some tentative observations about the overall fairness of the trials and the quality of justice thus far rendered by the SCSL.

## I. THE INTENDED ROLE OF THE SPECIAL COURT FOR SIERRA LEONE

The role of the SCSL is best discerned through examination of the original objectives of those who created it. The founders of the Court were the Government of Sierra Leone (GoSL) and the U.N. Security Council (Security Council). The government initiated the processes that ultimately led to the establishment of the SCSL, while the Security Council endorsed the idea and authorized its implementation by Secretary-General Kofi Annan. Each of their respective roles will be discussed in the subsections that follow.

### A. Sierra Leone's Request for U.N. Support for a Special Tribunal

On June 12, 2000, Sierra Leonean President Alhaji Ahmad Tejan Kabbah wrote to the President of the Security Council requesting support from the United Nations and the rest of the international community in establishing a "special court for Sierra Leone."<sup>3</sup> In his letter, the African leader, whose nation was at that point caught up in a war fueled by a lust for so-called "conflict" or "blood diamonds,"<sup>4</sup> described the need for a "strong court in order to bring and maintain peace and security" to his country and the sub-region.<sup>5</sup> He advocated for a "strong and credible court" that would prosecute those leaders of the rebel Revolutionary United Front (RUF) who had planned and executed a brutal, decade long civil war in which ordinary civilians were routinely targeted, and in which about 500 U.N. peacekeepers had, at one point, been taken hostage.<sup>6</sup>

The Sierra Leonean leader made a strong case for international support. He explained that approximately ten years of indiscriminate murder, amputations, abductions, and abuse of civilians—especially girls and women who were used as sex slaves—amply demonstrated why the

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3. President of the Republic of Sierra Leone, Annex to the Letter dated Aug. 9, 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000) [hereinafter Kabbah Letter to UNSC].

4. See generally JOHN L. HIRSCH, *SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY* (2001); IAN SMILLIE, LANSANA GBERIE & RALPH HAZLETON, *THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY* 1–3 (2000); GLOBAL WITNESS, *EXPERIENCES AND LESSONS LEARNED: MONITORING THE INTEGRATED DIAMOND MANAGEMENT PROGRAM'S DIAMOND TRACKING SYSTEM IN SIERRA LEONE* (2006) (reporting on a diamond tracking initiative for mining cooperatives in Sierra Leone); J. Andrew Grant, *Diamonds, Foreign Aid and the Uncertain Prospects for Post-Conflict Reconstruction in Sierra Leone*, 94 *ROUND TABLE*, 443, 451–54 (2005).

5. Kabbah Letter to UNSC, *supra* note 3, at 2.

6. *Id.*

RUF's reign of terror in his country had led to one of the worst civil conflicts in recorded history.<sup>7</sup> His government's experience dealing with the rebels over the failed Lomé Peace Agreement<sup>8</sup> confirmed that it was "only by bringing the RUF leadership and their collaborators to justice . . . that peace and national reconciliation and the strengthening of democracy" would be restored to Sierra Leone.<sup>9</sup> Furthermore, according to President Kabbah, the types of crimes that the RUF leadership and their accomplices had committed should be "of concern to all persons in the world, as they greatly diminish respect for international law and for the most basic human rights."<sup>10</sup>

He explained that, but for international support, Sierra Leone would be unable to dispense credible justice on behalf of the victims. The country simply lacked the resources, expertise, and domestic legislation necessary for such trials.<sup>11</sup> This was particularly true given its decimated legal and judicial infrastructure and the widespread nature and extent of the crimes.<sup>12</sup>

Ultimately, President Kabbah envisioned a "court that will meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil."<sup>13</sup>

### *B. The Security Council Endorses Sierra Leone's Request*

Security Council Resolution 1315, adopted on August 14, 2000, set forth the basic blueprint for the Court, drawing on the initial framework that President Kabbah proposed.<sup>14</sup> It reflects two underlying purposes that have remained central to the SCSL's mission throughout its existence.

First, the resolution affirmed the deep desire of the GoSL and the Security Council to ensure the prosecution of those who had committed

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7. See *id.* For commentary on the conflict in Sierra Leone, see Daniel J. Macaluso, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOK. J. INT'L L. 347, 347–48 (describing the basic path of negotiations, and the overall purpose of the Lomé Peace Agreement, which offered amnesty in exchange for ceasefire).

8. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, U.N. Doc. S/1999/777/Annex (July 12, 1999) [hereinafter *Lomé Agreement*].

9. Kabbah Letter to UNSC, *supra* note 3, at 2.

10. *Id.*

11. *Id.* at 3.

12. *Id.*

13. *Id.*

14. S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

serious crimes in Sierra Leone based on “international standards of justice, fairness and due process of law.”<sup>15</sup> Paragraph 6 of the Preamble noted “the importance of compliance with international humanitarian law” and stressed the need to uphold the principle of individual criminal responsibility for those who violate its norms.<sup>16</sup> President Kabbah’s goal of “bringing justice”<sup>17</sup> and ending impunity was underscored by the Security Council’s express determination to “exert every effort”<sup>18</sup> to bring those individuals responsible for heinous crimes to justice.

Second, the resolution captured the parties’ conviction that in the particular circumstances of Sierra Leone a “credible system of justice and accountability” would not only help “end impunity” for the grave offences that were committed there, but would also contribute to “lasting peace” and “national reconciliation.”<sup>19</sup> Resolution 1315 emphasized the “negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system.”<sup>20</sup> The Security Council then highlighted the important contribution that the international community can make in expediting that process, as well as to the challenge of “bringing justice and reconciliation to Sierra Leone and the region.”<sup>21</sup>

President Kabbah had requested a tribunal created under the “Security Council’s authority.”<sup>22</sup> He felt that this would give it strong enforcement powers,<sup>23</sup> including the ability to require states to cooperate with it consistent with the binding nature of decisions taken for the maintenance of collective peace and security under Chapter VII of the U.N. Charter.<sup>24</sup> Though it rejected that request,<sup>25</sup> the Security Council did reiterate, in the final preambulatory paragraph of the resolution, that the

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15. *Id.* at 1 (emphasis added).

16. *Id.*

17. Kabbah Letter to UNSC, *supra* note 3, at 2.

18. S.C. Res. 1315, *supra* note 14, at 1.

19. *Id.*

20. *Id.* at 2.

21. *Id.*

22. Kabbah Letter to UNSC, *supra* note 3, at 4.

23. *Id.*

24. U.N. Charter arts. 39–51 (empowering the Security Council to undertake actions respecting threats to the peace, breaches of the peace, and acts of aggression, which has been invoked, in particular that given by Article 41, to create international tribunals).

25. Compare Kabbah Letter to UNSC, *supra* note 3, at 4 (requesting that the Security Council create a tribunal for Sierra Leone under its Chapter VII authority), with S.C. Res. 1315, *supra* note 14, at 2 (recommending that a tribunal be created by an agreement between the Secretary-General and Sierra Leone and omitting any recommendation to create a court under the Security Council’s Chapter VII authority).

Sierra Leone situation “continues to constitute a threat to international peace and security in the region.”<sup>26</sup>

The parties sought to achieve the above objectives through the establishment of a new, efficient, and focused ad hoc tribunal. Though this point has been largely missed in the literature, the Kabbah request and the subsequent consultations with relevant stakeholders in Sierra Leone revealed a “clear preference . . . for a national court with a strong international component in all its organs (judges, prosecutors, defence counsel and support staff), and for international assistance in funding, equipment and legal expertise.”<sup>27</sup> Though the national courts were clearly underfunded and understaffed, the Sierra Leonean lawyers and judges that were consulted suggested that the local justice system was capable of holding fair trials. However, the United Nations preferred an international court with strong national elements. This was partly because of the concern that integrating the tribunal into the national justice system implied that the death penalty could apply to those convicted.<sup>28</sup>

Despite these and other important differences (for example the controversy regarding whether child soldiers ought to be prosecuted) Sierra Leonean and U.N. officials quickly reached agreement on the core aspects of the Court. Indeed, the main negotiations between the legal representatives of the parties, which took place first in the United States and then Sierra Leone, concluded in less than a week in September 2000.<sup>29</sup>

### C. U.N.-Sierra Leone Agreement and Key Features of SCSL Jurisdiction

The final version of the bilateral agreement, to which a statute was annexed, was signed in Freetown, the Sierra Leonean capital, on January 16, 2002.<sup>30</sup> It set out the legal framework for a mixed court, featuring

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26. S.C. Res. 1315, *supra* note 14, at 2.

27. U.N. Secretary-General, *Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶ 9, U.N. Doc. S/2000/751 (July 31, 2000).

28. *Id.* ¶ 10 (noting that the U.N. and many of its member states would oppose a legal process involving application of the death penalty). In a later report, the Secretary-General conceded that it would require considerable persuasion to convince Sierra Leoneans, who had suffered atrocities that few societies had experienced, that “exclusion of the death penalty and its replacement by imprisonment is not an ‘acquittal’ of the accused, but an imposition of a more humane punishment.” U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 7, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *UNSG Report*].

29. *UNSG Report*, *supra* note 28, ¶¶ 5–6.

30. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter U.N.-Sierra Leone Agreement].



both local and international elements, while attempting to account for some of the experiences of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/ICTR). The constitutive instruments of the SCSL elaborated many novel features that were intended to reflect the specifics of the country's conflict and the brutal nature of the crimes perpetrated.<sup>31</sup>

As such, the Court was to be independent of Sierra Leonean courts as well as of the United Nations.<sup>32</sup> Significantly, unlike the ICTY and ICTR, which were geographically divorced from their crime bases, the SCSL was to be located in the "theater of conflict."<sup>33</sup> It was also to be financed through voluntary contributions from U.N. member states rather than as a subsidiary organ of the Security Council.<sup>34</sup> The Secretary-General strenuously objected to this, warning presciently that such a volatile funding structure was neither viable nor sustainable.<sup>35</sup> One of the compromises devised to assuage him was the creation of a Management Committee comprised of interested third party countries to assist the Court's fundraising efforts while providing advice, policy direction, and overall operational oversight.<sup>36</sup> As this Article will show, the decision to use donations to fund this important justice initiative proved to be a bane to the operations and ultimate legacy of the SCSL.

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31. UNSG Report, *supra* note 28, ¶ 11. For the novel features of the SCSL, see Charles Chernor Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L & COMP. L. 165, 175–76 (2007) [hereinafter Jalloh, *The Contribution of the SCSL*].

32. UNSG Report, *supra* note 28, ¶ 9. See Prosecutor v. Gbao, Case No. SCLS-04-15-PT, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court (May 25, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=1toQC6w%2fLME%3d&tabid=195>.

33. Vincent O. Nmehielle & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107, 108 (2006) [hereinafter Nmehielle & Jalloh, *Legacy of the SCSL*].

34. As an organ of the Security Council, the Court would be entitled to a budget borne in accordance with Article 17 of the U.N. Charter. In contrast to the ICTY and ICTR, the SCSL would be financed solely through voluntary contributions of states. This was mostly because the main sponsor of the SCSL project at its creation, the United States (which introduced the draft of what became S.C. Res. 1315) did not want to be saddled with paying for it. See also U.N. Secretary-General, Letter dated Jan. 12, 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/40 (Jan. 12, 2001).

35. The Secretary-General cited legal, practical, and moral reasons why donations should not be used to fund the Court. For more on this warning, which proved to be prescient, see the discussion in UNSG Report, *supra* note 28, ¶¶ 68–72.

36. U.N.-Sierra Leone Agreement, *supra* note 30, art. 7 (describing the functions of the Management Committee and the "understanding of the Parties that interested States may wish to establish a management committee to assist the Special Court in obtaining adequate funding").

Security Council Resolution 1315 had set forth a vision of the “efficient, independent and impartial functioning of the special court.”<sup>37</sup> To reach those goals, and to resolve some of the pressures felt by the other tribunals, the Court’s personal jurisdiction was circumscribed, firstly, to prosecutions of only those individuals bearing the “greatest responsibility”<sup>38</sup> for the crimes perpetrated and, secondly, to offenses committed after November 30, 1996. It was felt that initiating jurisdiction from March 23, 1991, when the Sierra Leonean conflict began, would overburden the Prosecution and drag out the SCSL’s proceedings.<sup>39</sup>

The Statute of the Court conferred *ratione materiae* jurisdiction for crimes against humanity, war crimes, and other serious violations of international humanitarian law. It also included certain Sierra Leonean crimes committed on national territory.<sup>40</sup> These concerned the abuse of children under fourteen years old<sup>41</sup> and the offense of arson.<sup>42</sup> The jurisdiction over national offences was expressly included at the Kabbah Government’s request to help foster a sense of local ownership of the SCSL and its processes; to allow greater flexibility to the Prosecutor to pick and choose which of national and or international offences to charge suspects with; and finally, to cast a wider net to ensure that the leaders responsible for the atrocities would not escape punishment.<sup>43</sup> But, in practice, the national crimes were never used because of a prosecutorial policy decision.<sup>44</sup> Whatever law was to be used, the Court was to focus on prosecuting the top echelon responsible for the atrocities, in particular, “those leaders who had threatened the establishment of and implementation of the peace process in Sierra Leone.”<sup>45</sup>

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37. S.C. Res. 1315, *supra* note 14, ¶ 8(b).

38. Statute of the Special Court for Sierra Leone, art. 1, ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 145.

39. *UNSG Report*, *supra* note 28, ¶¶ 21–28.

40. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145, arts. 2 (crimes against humanity), 3 (war crimes), and 4 (other serious violations of international humanitarian law).

41. *Id.* art. 5(a)(i–iii) (citing Prevention of Cruelty to Children (1926) Cap. (31) (Sierra Leone)).

42. *Id.* art. 5(b)(i–iii) (citing Malicious Damage Act, 1861, 24 & 25 Vict., c. 97 (U.K.)).

43. Kabbah Letter to UNSC, *supra* note 3, at 3.

44. Jalloh, *The Contribution of the SCSL*, *supra* note 31, at 173. On the other hand, it could be argued that this was a wise decision in the circumstances because it avoided further debates about the legality of prosecuting domestic crimes given the uncertainty of the blanket amnesty that had been given to all combatants, including the rebels. It also avoids dealing with complications arising from the use of national law, including the lack of access to case reports of national decisions.

45. Statute of the Special Court for Sierra Leone, art. 1, ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 145. For a discussion of the temporal and personal jurisdiction of the SCSL, see *UNSG Report*, *supra* note 28, ¶¶ 21–31. See also Abdul Tejan-Cole, *The Special Court for*

The agreement (and annexed statute) creating the SCSL formally entered into force on April 12, 2002 after both the Government of Sierra Leone and the United Nations completed their respective formalities required for its implementation.<sup>46</sup> The Court was thereafter built in Freetown in the rather extreme circumstances of a war-weary capital city with almost zero infrastructure: no electricity, no phones, and no running water. Regrettably, the “poor state” of the judiciary, the eroded rule of law, and the lack of accountability—which had contributed to the conflict in the first place—continued to plague the country well beyond 2002.<sup>47</sup>

## II. BACKGROUND TO THE CASES PROSECUTED BEFORE THE SPECIAL COURT FOR SIERRA LEONE

Despite the serious challenges of building a new court from the ground up in such a difficult post-conflict context characterized by atrocity crimes,<sup>48</sup> the SCSL overcame its slow start and went on to successfully try eight individuals in what became known as the Armed Forces Revolutionary Council (AFRC),<sup>49</sup> RUF,<sup>50</sup> and Civil Defense

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*Sierra Leone: Conceptual Concerns and Alternatives*, 1 AFR. HUM. RTS. L.J. 107, 115–16 (2001) (reviewing various critiques of this limited temporal jurisdiction).

46. See U.N.-Sierra Leone Agreement, *supra* note 30, art. 21 (“The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.”); Prosecutor v. Kallon, Case No. SCSL-04-14-PT-035-II, Decision on Constitutionality and Lack of Jurisdiction, ¶ 44 (Mar. 13, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=cIL%2bJhyJ66Y%3d&tabid=193>.

47. Nmehielle & Jalloh, *Legacy of the SCSL*, *supra* note 33, at 109.

48. PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, FIRST ANNUAL REP. OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE FOR THE PERIOD 2 DEC. 2002–1 DEC. 2003, 15, 19, 22, 31 (2003) (discussing the challenges and security difficulties of setting up the Prosecutor’s office and entire court from scratch); David M. Crane, *International Criminal Tribunals in the 21st Century: Terrorists, Warlords, and Thugs*, 21 AM. U. INT’L L. REV. 505, 505, 515 (2006) [hereinafter Crane, *Terrorists, Warlords, and Thugs*] (describing unrest and the absence of the rule of law at the time of the Court’s establishment).

49. See Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-A, Judgment (Feb. 22, 2008), <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx> [hereinafter Prosecutor v. Brima Appeals Judgment]; Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-T, Judgment (June 20, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106> [hereinafter Prosecutor v. Brima Trial Judgment].

50. Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Judgment (Mar. 2, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=buPK1wx%2bWSo%3d&tabid=215> [hereinafter Prosecutor v. Sesay Trial Judgment]. See also Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-A, Judgment (Oct. 26, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=CGgVJRfNF7M%3d&tabid=218> [hereinafter Prosecutor v. Sesay Appeals Judgment].

Forces (CDF)<sup>51</sup> trials. Though the shorthand used for the cases was suggestive, the organizations were not formally indicted.

In this part of the Article, I provide some background to each of these cases for two main reasons. First, not all readers will be familiar with the cases prosecuted before the Court. Second, the overview shows the small number of cases tried and the relative level of responsibility of the accused vis-à-vis other, better known players in the conflict. It therefore contextualizes my later criticism regarding who was prosecuted and who was not.

As we shall see below, the bulk of the indictments were initially issued separately in March 2003 with all the remainder following in the next few months.<sup>52</sup> They were later joined into three main trials. Each case included three alleged members of the RUF, AFRC, and CDF factions respectively—the main protagonists of the armed conflict.

#### A. The Revolutionary United Front Case

In the RUF Case, the first indictment was issued against the rebel leader, Foday Saybana Sankoh, and a few of his top lieutenants, Sam Bockarie, Issa Hassan Sesay, and Morris Kallon, in March 2003.<sup>53</sup> Augustine Gbao was separately indicted just over a month later.<sup>54</sup> In December 2003, the Prosecutor withdrew the indictments against Sankoh and Bockarie due to their confirmed deaths.<sup>55</sup> At the

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51. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment, ¶ 1 (Aug. 2, 2007), <http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberJudgement/tabid/175/Default.aspx> [hereinafter Prosecutor v. Fofana Trial Judgment]. See also Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment (May 28, 2008), <http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMIY%3d&tabid=194> [hereinafter Prosecutor v. Fofana Appeals Judgment].

52. See PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, *supra* note 48, at 7 (reporting that indictments were issued for Brima, Sesay, Kallon, and Norman in March 2003); *Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, SPECIAL CT. FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRC-Case/tabid/106/Default.aspx> [hereinafter *AFRC Case Timeline*] (reporting that Kamara was indicted in March 2003 and Kanu in September 2003); *Prosecutor vs. Fofana and Kondewa (CDF Case)*, SPECIAL CT. FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/tabid/104/Default.aspx> [hereinafter *CDF Case Timeline*] (reporting that Fofana and Kondewa were indicted in June 2003); *Prosecutor vs. Sesay, Kallon and Gbao (RUF Case)*, SPECIAL CT. FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx> [hereinafter *RUF Case Timeline*] (reporting that Gbao was indicted in April 2003).

53. For a basic timeline describing the progression of the case, see *RUF Case Timeline*, *supra* note 52.

54. *Id.*

55. The deaths of Sankoh and Bockarie led to withdrawals of their indictments. See *id.*; *Prosecutor v. Bockarie*, Case No. SCSL-2003-04-PT, Withdrawal of Indictment (Dec. 8, 2003), <http://www.sc-sl.org/LinkClick.aspx?fileticket=w81c%2bZX4wA1%3d&tabid=189>;

Prosecution's request, the Trial Chamber ordered joint trials for Sesay, Kallon, and Gbao in January 2004.<sup>56</sup>

The Prosecutor obtained an amended indictment in August of 2006, alleging eight counts of crimes against humanity, eight counts of war crimes, and two counts of other serious violations of international humanitarian law.<sup>57</sup> The charges included murder, rape, sexual slavery, other inhumane acts, violence to life, terrorizing the civil population, collective punishments, mutilation, pillage, use of child soldiers, and attacks on U.N. peacekeeping personnel.<sup>58</sup>

The trial opened on July 5, 2004, and concluded on August 5, 2008.<sup>59</sup> The Trial Chamber found each of the three accused guilty of most of the counts alleged in the indictment for crimes against humanity, war crimes, and other serious violation of international humanitarian law.<sup>60</sup> Many of the findings at the trial level were upheld by the Appeals Chamber.<sup>61</sup> The few instances where the defense's arguments prevailed on appeal, or where the appeals judges reversed the findings at trial for certain errors, resulted in the revision of the global sentences to fifty-two, forty, and twenty-five years for Sesay, Kallon, and Gbao respectively.<sup>62</sup>

### B. *The Armed Forces Revolutionary Council Case*

Alex Tamba Brima, the first accused in the AFRC trial, was first indicted in March 2003 for seventeen counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law.<sup>63</sup> In May 2003, the indictment was amended to include Brima Bazzy

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*The Prosecutor vs. Johnny Paul Koroma*, SPECIAL CT. FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/JohnnyPaulKoroma/tabid/188/Default.aspx> ("Koroma fled Freetown in January 2003. His fate and whereabouts are unknown, and he is considered to be at large.").

56. *Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara & Kanu*, Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder (Jan. 27, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=yqizQjIjdiU%3d&tabid=155> (ordering a separate, joint trial of Brima, Kamara, and Kanu of the Armed Forces Revolutionary Council (AFRC)).

57. *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-2004-15-PT, Corrected Amended Consolidated Indictment (Aug. 2, 2006), <http://www.sc-sl.org/LinkClick.aspx?fileticket=ppr39WF8TnM%3d&tabid=155>.

58. *Id.*

59. *RUF Case Timeline*, *supra* note 52.

60. *Prosecutor v. Sesay Trial Judgment*, Case No. SCSL-04-15-T, Judgment, 677–87 (Mar. 2, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=buPK1wx%2bWSo%3d&tabid=215>.

61. *Prosecutor v. Sesay Appeals Judgment*, Case No. SCSL-04-15-A, Judgment, 477–80 (Oct. 26, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=CGgVJRfNF7M%3d&tabid=218>.

62. *Id.* at 479–80.

63. For a basic timeline describing the progression of the case, see *AFRC Case Timeline*, *supra* note 52.

Kamara, who was originally indicted for seventeen counts.<sup>64</sup> Four months later the third accused, Santigie Borbor Kanu, was added to the indictment.<sup>65</sup>

In January 2004, the Trial Chamber considered the Prosecution's motions for joinder and ordered the joint trials of Brima, Kamara, and Kanu.<sup>66</sup> The consolidated indictment, approved by the judges in February 2005, contained fourteen counts, including the war crimes and crimes against humanity of murder, extermination, rape, acts of terrorism, collective punishments, unlawful killings, sexual violence, use of child soldiers, enslavement, and other inhumane acts.<sup>67</sup>

The trial opened on March 7, 2005, and concluded with closing arguments on December 8, 2006. Each of the accused was found guilty, in the words of the Trial Chamber, of committing "some of the most heinous, brutal and atrocious crimes ever recorded in human history."<sup>68</sup> Expressing outrage over the extent to which "innocent civilians were subjected to such savage and inhumane treatment,"<sup>69</sup> the judges sentenced Brima and Kanu to fifty years each, while Kamara was given forty-five years.<sup>70</sup>

### C. The Civil Defense Forces Case

Sam Hinga Norman was the first accused in the CDF Case.<sup>71</sup> He was indicted on March 7, 2003.<sup>72</sup> His indictment was amended to include Moinina Fofana and Allieu Kondewa on June 26, 2003.<sup>73</sup> The trials of

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64. *Id.*

65. *Id.*

66. Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara & Kanu, Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 19 (Jan. 27, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=yqizQjIjdiU%3d&tabid=155>.

67. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-PT, Further Amended Consolidated Indictment, ¶¶ 41–79 (Feb. 18, 2005), <http://www.sc-sl.org/LinkClick.aspx?fileticket=Of5nG3SDgff0=&tabid=106>.

68. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-T, Sentencing Judgment, ¶ 34 (July 19, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=v3P%2fxMoNm6U%3d&tabid=173>.

69. *Id.* ¶ 35.

70. *Id.* ¶ 36.

71. For a basic timeline describing the progression of the case, see *CDF Case Timeline*, *supra* note 52.

72. *Id.* See also Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-2004-14-PT, Indictment (Feb. 5, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=3DY274jtZAY=&tabid=104>.

73. See *CDF Case Timeline*, *supra* note 52.

these three individuals were formally joined<sup>74</sup> in January of 2004, and the final consolidated indictment was issued nearly a year later.<sup>75</sup> The latter alleged the commission of war crimes, crimes against humanity, and other serious violations of international humanitarian law. The eight counts included murder, acts of terrorism, collective punishments, pillage, looting and burning, terrorizing the civilian population, and causing physical violence and mental suffering. Charges were not included for sex related crimes.<sup>76</sup>

Norman died while in the custody of the SCSL, in the period between the conclusion of his case and issuance of the judgment. Consequently, the Trial Chamber terminated the proceedings against him, though his family opposed termination because they felt he could be vindicated.<sup>77</sup>

The trial of Fofana and Kondewa, which began on June 3, 2004, ended on October 18, 2006.<sup>78</sup> The majority of the Trial Chamber found

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74. Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder (Jan. 28, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=fRXpQ3jh5WI%3d&tabid=153>.

75. See Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment (May 16, 2005), <http://www.sc-sl.org/LinkClick.aspx?fileticket=r%2fwE4THduNw%3d&tabid=193>.

76. See Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment (May 20, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=2HXkGY17w80%3d&tabid=153>; Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-T, Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa (Aug. 2, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=E%2bSYEZIEOfQ%3d&tabid=153> (rejecting the Prosecutor's application to add sex crimes to the indictment). See also SARA KENDALL & MICHELLE STAGGS, UNIV. OF CAL. BERKELEY WAR CRIMES STUDIES CTR., *SILENCING SEXUAL VIOLENCE: RECENT DEVELOPMENTS IN THE CDF CASE AT THE SPECIAL COURT FOR SIERRA LEONE* (2005); Michelle Staggs Kelsall & Shanee Stepakoff, 'When We Wanted to Talk about Rape': *Silencing Sexual Violence at the Special Court for Sierra Leone*, 1 INT'L J. TRANSITIONAL JUST. 355 (2007).

77. The family effectively thought that the judgment could clear Norman's name but, as we shall see presently, the overall outcome of the trial undermines such speculation. See Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues (May 21, 2007), <http://www.sc-sl.org/scsl/Public/SCSL-04-14-PT%20CDF/SCSL-04-14-T-776.pdf>; Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-T, Norman Defence Team Submissions on His Death, ¶ 21 (Mar. 22, 2007), <http://www.sc-sl.org/scsl/Public/SCSL-04-14-PT%20CDF/SCSL-04-14-T-774.pdf>; Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Decision on Norman Defence Motion for Extension of Time to Seek Leave to Appeal Against Decision on Registrar's Submission of Evidence of the Death of Accused Samuel Hinga Norman and Consequential Issues (July 19, 2007), <http://www.sc-sl.org/scsl/Public/SCSL-04-14-PT%20CDF/SCSL-04-14-T-782.pdf> (dismissing appeal for lack of merit).

78. CDF Case Timeline, *supra* note 52.

the two men guilty.<sup>79</sup> The Sierra Leonean judge, Bankole Thompson, dissented.<sup>80</sup> The majority, comprised of two international judges from Cameroon and Canada respectively, convicted the defendants of various war crimes and crimes against humanity. The convictions included murder, child recruitment, collective punishments, violence to life, health, and physical or mental wellbeing of persons (in particular murder and cruel treatment), and pillaging.<sup>81</sup>

As with the other two cases, the guilty findings reached at trial were more or less upheld on appeal.<sup>82</sup> The Trial Chamber had taken the CDF's rationale of fighting to restore democracy as a mitigating factor in sentencing. The Appeals Chamber, however, reversed that decision and increased the sentence for Fofana from eight to fifteen years, while Kondewa was awarded twenty (instead of only six) years.<sup>83</sup> With their appeals now exhausted, the eight surviving convicts from the RUF, AFRC, and CDF trials have since been transferred to Mpanga Prison in Rwanda to serve their long jail terms.<sup>84</sup>

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79. Prosecutor v. Fofana Trial Judgment, Case No. SCSL-04-14-T, Judgment (Aug. 2, 2007), <http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberJudgement/tabid/175/Default.aspx>.

80. *Id.* at C-37 to -38 (Thompson, B., concurring and partially dissenting). Valerie Oosterveld, *International Criminal Justice, Politics and the Special Court for Sierra Leone*, 102 AM. SOC'Y INT'L L. PROC. 19, 21 (2008); William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 NW. U. J. INT'L HUM. RTS. 382, 388 (2008); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 750 (2008) [hereinafter Schabas, *Prosecutorial Discretion*]; Joseph A. K. Sesay, Commentary, *An Evaluation of the Motion for the Withdrawal of Justice Thompson*, CTR. FOR ACCOUNTABILITY & RULE OF LAW (Dec. 12, 2007), [http://www.carl-sl.org/home/index.php?option=com\\_content&view=article&id=89:an-evaluation-of-the-motion-for-the-withdrawal-of-justice-thompson&catid=10:commentaries&Itemid=21#emjt\\_ref\\_3](http://www.carl-sl.org/home/index.php?option=com_content&view=article&id=89:an-evaluation-of-the-motion-for-the-withdrawal-of-justice-thompson&catid=10:commentaries&Itemid=21#emjt_ref_3).

81. Prosecutor v. Fofana Trial Judgment, Case No. SCSL-04-14-T.

82. Prosecutor v. Fofana Appeals Judgment, Case No. SCSL-04-14-A, Judgment (May 28, 2008), <http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMIY%3d&tabid=194>.

83. *Id.* See Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa (Oct. 9, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=7U8%2FVrPndPg%3d&tabid=175>.

84. Press Release, Special Court for Sierra Leone Outreach and Public Affairs Office, Special Court Prisoners Transferred to Rwanda to Serve Their Sentences (Oct. 31, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=YiPY3dNd%2fiI%3d&tabid=214>. See also Amended Agreement Between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, Special Court for Sierra Leone-Rwanda, Mar. 18, 2009, <http://www.sc-sl.org/LinkClick.aspx?fileticket=WNTKRbIUNNc%3d&tabid=176>.



### D. The Charles Taylor Case

Today, the trial of former Liberian President Charles G. Taylor is the only one remaining before the SCSL.<sup>85</sup> An initial eighteen-count indictment was first issued and confirmed in March 2003.<sup>86</sup> As part of a peace deal in Liberia, Taylor relinquished power and went into exile in Nigeria. About two years later, he was apprehended by Nigerian authorities while allegedly fleeing the country. Taylor has since given his version of the story and contends that authorities in Nigeria had offered him safe passage to leave the country.<sup>87</sup> Whatever the case may be, following his arrest at the end of March 2006, he was immediately flown to Liberia and thereafter swiftly transferred to the custody of the Court.<sup>88</sup>

After Taylor's arrest, but before his trial opened, the Prosecutor sought an amended indictment.<sup>89</sup> In the further amended indictment, designed apparently to address the defective pleading of the Joint Criminal Enterprise doctrine, he was charged with eleven counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law.<sup>90</sup> These include: murder; acts of terrorism; the use of

85. Given that I served as court-appointed duty counsel to former President Taylor during the opening of his trial, and my previous role as the Legal Advisor to the Defense Office in the SCSL, I have refrained from commenting on the merits of the Taylor Case for reasons of professional ethics. While I am no longer employed by the tribunal, this is the proper thing to do as the case is currently *sub judice* before the Court. Once trial judgment is rendered, one can engage in academic analysis of the case. For the drama that unfolded in front of world media during the opening of the trial, see Transcript of Record, Prosecutor v. Taylor, Case No. SCSL-2003-01-T (June 4, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=PlaICui9PkU%3d&tabid=160>. For commentary, see Richard J. Wilson, 'Emaciated' Defense or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?, 15 HUM. RTS. BRIEF 6 (2008).

86. For a basic timeline describing the progression of the case, see *Prosecutor vs. Charles Taylor*, SPECIAL CT. FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> [hereinafter *Taylor Case Timeline*].

87. Transcript of Record at 24347–49, Prosecutor v. Taylor, Case No. SCSL-2003-01-T (July 14, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=DqhX5YnoIN4%3d&tabid=160>.

88. See Press Release, Special Court for Sierra Leone Office of the Prosecutor, Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court (Mar. 29, 2006), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=hWEjA9QZg10%3d&tabid=196>.

89. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Amended Indictment (Mar. 17, 2006), <http://www.sc-sl.org/LinkClick.aspx?fileticket=VifMuLYvYs4=&tabid=159>.

90. Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Decision on the Prosecution Motion Requesting Leave to Amend Indictment (May 25, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=PN0wdix2ZLO=&tabid=159>. For a highly critical commentary of the Prosecution's defective pleading of joint criminal enterprise at the SCSL, including in the Taylor Case, see Wayne Jordash & Penelope Van Tuyl, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost Its Way at the Special Court for Sierra Leone*, 8 J. INT'L CRIM. JUST. 591, 599–601 (2010). See also Jennifer Easterday, *Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone*,

child soldiers; pillage; violence to life, health, and physical or mental wellbeing of persons, in particular cruel treatment, sexual slavery, and other forms of sexual violence, rape; and outrages against personal dignity.<sup>91</sup>

In a highly controversial decision, the Security Council, relying on its Chapter VII enforcement powers, adopted Resolution 1688 on June 16, 2006, authorizing Taylor's transfer to The Hague. The President of the SCSL thereafter issued an order giving judicial imprimatur to the decision.<sup>92</sup> Addressing important matters with implications for the rights of the accused—in particular the presumption of innocence—both the resolution and the order expressed concerns about the potential instability that would have resulted in Liberia and Sierra Leone had Taylor been formally tried at the seat of the Court in Freetown.<sup>93</sup> Taken together, these decisions appear to have dealt a serious blow to the legitimacy of the SCSL among Sierra Leoneans, as many wished to have closer and easier access to the trial.<sup>94</sup>

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3 BERKELEY J. INT'L L. PUBLICIST 36, 39–42 (2009) (discussing the defective pleading of joint criminal enterprise liability in the SCSL case).

91. Prosecutor v. Taylor, Case No. SCSL-03-01-I, Amended Indictment, ¶¶ 5–31 (Mar. 17, 2006), <http://www.sc-sl.org/LinkClick.aspx?fileticket=VifMuLYvYs4=&tabid=159> (Count 1: acts of terrorism; Count 2: murder; Count 3: violence to life, health and physical or mental well-being of persons, in particular murder; Count 4: rape; Count 5: sexual slavery and any other form of sexual violence; Count 6: outrages upon personal dignity; Count 7: violence to life, health and physical or mental well-being of persons, in particular cruel treatment; Count 8: other inhumane acts; Count 9: child soldiers; Count 10: enslavement; Count 11: pillage).

92. Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Order Changing Venue of Proceedings (June 19, 2006). For commentary, see generally *Special Court for Sierra Leone: Issues for Consideration Regarding the Location of the Trial of Charles Taylor*, AMNESTY INT'L USA (Apr. 5, 2006), <http://www.amnestyusa.org/document.php?id=ENGAFR510052006&lang=e> (discussing considerations in making the decision to transfer Taylor, and the potential consequences of doing so); Charles Jalloh, *The Law and Politics of the Charles Taylor Case*, CANADIAN COUNCIL ON INT'L L. (Apr. 2006), [http://www.ccil-ccdi.ca/index.php?option=com\\_content&task=view&id=165&Itemid=76](http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=165&Itemid=76) (analyzing the Taylor defense's proffered reasons for challenging a change of venue to the Hague); Charles Chernor Jalloh, *Special Court for Sierra Leone Dismisses Taylor Motion Against Change of Venue*, AM. SOC'Y INT'L L.: ASIL INSIGHTS (June 15, 2006), <http://www.asil.org/insights060615.cfm> (discussing a preliminary decision of the Appeals Chamber of the SCSL finding a defense motion challenging change of venue of the Taylor trial to be premature and therefore inadmissible).

93. S.C. Res. 1688, pmbl., U.N. Doc. S/RES/1688 (June 16, 2006); Press Release, Special Court for Sierra Leone, Special Court President Requests Charles Taylor be Tried in The Hague (Mar. 30, 2006), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=gR%2bYCtzTfKg%3d&tabid=111>.

94. See SARA KENDALL & MICHELLE STAGGS, UNIV. OF CAL. BERKELEY WAR CRIMES STUDIES CTR., INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE, 32–34 (2005); *Special Court for Sierra Leone: Issues for Consideration Regarding the Location of the Trial of Charles Taylor*, supra note 92 (“The organization believes that moving the trial would have the negative effect of distancing the justice process from the Sierra Leonean people who have suffered directly as a result of the crimes for which Charles Taylor is indicted.”); *The Trial of*

The Prosecution presented its case between June 4, 2007 and February 27, 2009.<sup>95</sup> In total, it called ninety-one *viva voce* witnesses.<sup>96</sup> The Defense Case opened on July 13, 2009 and closed on November 12, 2010. Twenty-one witnesses testified for the Defense. The Prosecution successfully applied<sup>97</sup> to reopen its case to call three additional witnesses during the defense phase of the trial.<sup>98</sup> The trial formally closed on February 11, 2011.<sup>99</sup> Trial judgment will likely be rendered between mid-2011 and mid-2012. Based on experience with the other SCSL cases, the appeals process will probably continue for another six months thereafter.

### III. SOME LIMITATIONS OF THE SPECIAL COURT FOR SIERRA LEONE

To discern the quality of justice served at the Court, the trial “achievements”—that is, the prosecutions and convictions discussed above—must be considered through the lens of international standards of justice. This part of the Article offers an analysis of the fairness of proceedings from the defense perspective. In doing so, I advance three main criticisms.

First, I consider the issue of selective prosecutions. I focus on the concept of greatest responsibility, which was formally introduced into international criminal law by the Statute of the SCSL. I assess its mean-

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*Charles Taylor Must be Made Relevant to Sierra Leoneans and Liberians*, AMNESTY INT’L USA (June 1, 2007), <http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR340052007>.

95. *Taylor Case Timeline*, *supra* note 86.

96. Press Release, Special Court for Sierra Leone Office of the Prosecutor, Testimony for the Prosecution Concluded in Taylor Trial (Feb. 2, 2009), *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=9UCsv93B70k%3d&tabid=196>.

97. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses (June 29, 2010), <http://www.sc-sl.org/LinkClick.aspx?fileticket=+Hw4w/3wxKA=&tabid=159>; Prosecutor v. Taylor, Case No. SCSL-03-01-T, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell (June 30, 2010), <http://www.sc-sl.org/LinkClick.aspx?fileticket=Fj4WYJwFP8E=&tabid=159>.

98. *See Taylor Case Timeline*, *supra* note 86. The Prosecutor requested that the Trial Chamber order scheduling of the remainder of the case and impose deadlines on the Defense’s presentation of its case. The judges dismissed the motion. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Decision on Prosecution Request for Orders in Relation to the Scheduling of the Remainder of the Case (Mar. 29, 2010), <http://www.sc-sl.org/LinkClick.aspx?fileticket=137QlxNUVyU=&tabid=159>; Prosecutor v. Taylor, Case No. SCSL-03-01-T, Order Setting a Date for Closure of the Defence Case and Dates for Filing of Final Trial Briefs and the Presentation of Closing Arguments (Oct. 22, 2010), <http://www.sc-sl.org/LinkClick.aspx?fileticket=Fqr7U0U8DTY%3d&tabid=159>.

99. Transcript of Record at 49314, Prosecutor v. Taylor, Case No. SCSL-03-01-T (Feb. 11, 2011), <http://www.sc-sl.org/LinkClick.aspx?fileticket=fU3SzuVteNQ%3d&tabid=160> (adjourning the trial sine die).

ing and impact on prosecutorial policy and, ultimately, who was tried (and convicted) and who was not. Second, I consider the manner in which the individuals charged by the Prosecutor were tried. The fairness of the trials is then measured against general due process standards applicable to the Court by fiat of its constitutive instruments and international human rights law. Put simply, was justice not only done but also *seen to be done*? Third, I show how the shoestring funding of the SCSL translated into limited support for the Defense Office and resulted in an inequality of arms between defense lawyers and prosecutors.

A. *Excessively Narrow Interpretation of "Greatest Responsibility"*

Article 1 of the Statute of the SCSL grants the Court personal jurisdiction to prosecute persons who bear the "greatest responsibility" for serious violations of international humanitarian and Sierra Leonean law, "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." By crafting a mandate suggesting that the SCSL would actually prosecute all those bearing *greatest responsibility*, the Security Council<sup>100</sup> and the GoSL made a significant symbolic, legal, and political commitment.<sup>101</sup>

In practice, the Prosecutor's overly narrow interpretation of that phrase generated intense debates about its meaning and scope, both inside and outside the SCSL,<sup>102</sup> beginning when suspects were first arrested. The reason for the controversy stems from two main factors. First, whereas other tribunals had been given jurisdiction over persons responsible, this was the first time that the greatest responsibility standard was formally used in international criminal law. And second, the constitutive instruments of the Court did not specify what it meant.

During the discussions regarding the SCSL's establishment, the Secretary-General observed that the idea of greatest responsibility was the Security Council's shorthand way of referring to the command authority

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100. See Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT'L AFF. 311, 319 (2004) (describing the political contention between the Security Council and the Secretariat over the best way for the Statute to modify responsibility).

101. For more discussion on the decision and implications of this construction, see *id.* at 319–20, 326; James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 639–44 (2005) [hereinafter Cockayne, *The Fraying Shoestring*].

102. See, e.g., Dougherty, *supra* note 100, at 326 (describing how "the greatest responsibility" in and of itself provided "an overly restrictive formulation," and that, as interpreted by the prosecutor, indicting only "a baker's dozen seems far too few").

of the suspect and the gravity and scale of the crime.<sup>103</sup> He found this too limiting in terms of the number of persons that would be prosecuted. He therefore urged the Security Council to adopt a slightly wider personal jurisdiction (i.e. “persons most responsible”) though that proposal was rejected. While the Freetown trials have now concluded, given the small number of persons that were ultimately prosecuted, the controversy about the actual meaning and intent behind the phrase has resurfaced within the body politic in Sierra Leone.

The jurisprudential meaning of greatest responsibility was articulated by the CDF and AFRC Trial Chambers as well as the Appeals Chamber of the SCSL.<sup>104</sup> Each of the two trial chambers, which are not legally bound to adopt each other’s interpretations, construed the concept differently.<sup>105</sup> The CDF Trial Chamber held that greatest responsibility was both a matter of prosecutorial discretion, and a “jurisdictional limitation upon the Court.”<sup>106</sup> However, the judges ruled that the phrase is not a material element that the Prosecution needed to prove beyond a reasonable doubt.<sup>107</sup> Rather, it is one that should be considered by the Confirming Judge, at the pre-trial stage, to determine whether there is sufficient evidence providing reasonable grounds to believe that a particular suspect bears the greatest responsibility. They reasoned that: “[w]hether or not *in actuality* the Accused could be said to bear the greatest responsibility can only be determined by the Chamber after considering all the evidence presented during trial.”<sup>108</sup>

On the other hand, the AFRC Trial Chamber found that the concept of greatest responsibility does not serve as a distinct jurisdictional threshold or limitation. Instead, it “solely purports to streamline the focus of

103. See *UNSG Report*, *supra* note 28, ¶¶ 29–31.

104. For commentary, see Valerie Oosterveld & Andrea Marlowe, *Special Court for Sierra Leone International Decisions*, 101 AM. J. INT’L L. 848, 855–56 (2007). For a focused comparison of the “greatest responsibility” as considered in the Civil Defense Forces (CDF) and AFRC Trial Chamber Judgments, see Valerie Oosterveld, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu and Prosecutor v. Moinina Fofana & Allieu Kondewa*, 103 AM. J. INT’L L. 103 (2009) (discussing the Appeals Chamber position on the issue).

105. The Statute and Rules of Procedure and Evidence do not constrain the Trial Chambers to giving one another’s judgment binding authority. The only explicit type of *stare decisis* observed at the Court is that the Appeals Chamber is to be “guided” by the decisions of the Appeals Chamber of the ICTR and ICTY. Statute of the Special Court for Sierra Leone, art. 20, Jan. 16, 2002, 2178 U.N.T.S. 145.

106. *Prosecutor v. Fofana Trial Judgment*, Case No. SCSL-04-14-T, Judgment, ¶¶ 91–92 (Aug. 2, 2007), <http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberJudgement/tabid/175/Default.aspx>.

107. *Id.* ¶ 92.

108. *Id.* (emphasis in original).

prosecutorial strategy.”<sup>109</sup> In particular, taking into account the relevant documentary history, this group of judges rejected the idea that the drafters of the Statute of the SCSL could have intended “greatest responsibility” to serve as a dispositive jurisdictional threshold which, if unmet, would require them to dismiss a case.<sup>110</sup> On this view, because the Prosecutor was envisioned as a separate organ of the Court charged with making such assessments, the Trial Chamber could not review his decisions to bring a case against a particular person as one of those bearing greatest responsibility.<sup>111</sup>

The job of reconciling the two different interpretations fell to the Appeals Chamber in the AFRC Case—their first judgment on the merits.<sup>112</sup> In response to Kanu’s appeal against conviction, which argued that the trial judges had misinterpreted and misapplied the applicable personal jurisdiction threshold, the appeals judges ruled that greatest responsibility serves only as a guide to prosecutorial discretion and not a limitation on jurisdiction. They essentially endorsed the separation of powers argument advanced by some of their colleagues at the trial level. As they put it:<sup>113</sup>

It is evident that it is the Prosecutor who has the responsibility and competence to determine who are to be prosecuted as a result of investigation undertaken by him. It is the Chambers that have the competence to try such persons who the Prosecutor has consequently brought before it as persons who bear the greatest responsibility.

There are two principal issues with this interpretation. First, both the AFRC Trial and Appeals Chamber overstate the scope of prosecutorial discretion. Clearly, under the statute, there are jurisdictional requirements and standards of proof that the Prosecutor must meet in order to bring a case against a particular suspect. These include showing that the requisite personal, temporal, and subject matter jurisdiction as set out by

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109. *Prosecutor v. Brima Trial Judgment*, Case No. SCSL-04-16-T, Judgment, ¶ 653 (June 20, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=EqkfVSpLWM=&tabid=106> (“The Trial Chamber, with the greatest respect, does not agree with the finding of Trial Chamber I . . . that ‘the issue of personal jurisdiction is a jurisdictional requirement.’”).

110. *Id.*

111. *Id.* ¶ 654.

112. *See Prosecutor v. Brima Appeals Judgment*, Case No. SCSL-04-16-A, Judgment, ¶ 281 (Feb. 22, 2008), <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx>; Oosterveld & Marlowe, *supra* note 104, at 856 (arguing that the Appeals Chamber judgment would be significant for this clarification but that the interpretation is nonetheless unlikely to change the outcomes of the judgments).

113. *Prosecutor v. Brima Appeals Judgment*, Case No. SCSL-04-16-A, ¶ 281.

the relevant instruments is fulfilled. Considering that the trial judges already review prosecutorial decisions with regard to those requirements through the confirmation of indictments process, it is unclear why it is not feasible for the judges to use that process to review the threshold issue of whether a particular accused appears to bear greatest responsibility.

Admittedly, this evaluation is a difficult one and in practice may be premature to carry out during the pre-indictment stage. Among other things, the confirming judge would not have the same information and body of evidence against a particular person as the Prosecutor. Under the relevant rules, only the basic name and particulars of the suspect, a statement of each specific offence alleged, and a brief case summary setting out the allegations is required.<sup>114</sup> The judge only has to be satisfied that the basic facts as alleged would, if proven, amount to a crime as particularized in the indictment. As the standard of review is rather low at this stage, the evaluation of whether a particular suspect bore the greatest responsibility would be better conducted after the evidentiary phase of the trial is completed. This offers some benefits that may otherwise be unavailable.

For instance, assessment at the end of the trial gives the bench the opportunity to evaluate the evidence presented by both the Prosecution and the Defense, secure in the knowledge that the bulk, if not all of it, was tested under rigorous cross-examination. They would be better placed, based on their hearing of presumably reliable evidence, to make the important determination that a particular accused is among those bearing the greatest responsibility. Instead, the Appeals Chamber chose to confer seemingly wider discretion on the Prosecutor. They failed to consider that the exercise of discretion in law is amenable to some form of judicial review to prevent manifestly absurd or patently unreasonable results. In the context of the exercise of the important prosecutorial power in criminal trials, independent judicial review helps to prevent, or at least limit, overzealous prosecutions and prosecutorial abuse of process in relation to the rights of suspects and accused persons.

The second and more fundamental problem with the Appeals Chamber's approach arises because judicial oversight of the application of the greatest responsibility threshold is also important to ensure that the Court fulfills its intended purpose by prosecuting only higher ranking individuals rather than those holding a middle, or worse, lower rank. The logical consequences of their decision is that anyone, whether bearing

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114. R. P. & EVID. 47, Special Court for Sierra Leone, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=zXPrwoukovM%3d&tabid=176>.

high levels of responsibility, or not, could be prosecutable despite the clear language of the statute and the intent of the founders of the SCSL. In abdicating the determination of the scope of greatest responsibility personal jurisdiction to the Prosecutor, the appeals judges stressed that any other interpretation that might result in the release of an accused would, in the circumstances after such a lengthy trial, be both “unreasonable and unworkable.”<sup>115</sup> This statement suggests that the judges were ultimately more worried about the immediate implications of their findings for the particular cases before them than actually delimiting the boundaries of the Court’s personal jurisdiction.

It is true that it makes little sense to require the Prosecutor to prove that each of the accused is one of those bearing greatest responsibility or face the alternative that the person, already factually found culpable for the commission of specific crimes, would be released.<sup>116</sup> If such technical legalistic arguments were to succeed and lead to such a result, the Court would easily lose credibility in the eyes of the public. At the same time, keeping in mind the overall purposes of international criminal trials and the legislative history of the “greatest responsibility” formula chosen for the SCSL’s personal jurisdiction, it would seem that the level of responsibility of an accused is ultimately a germane question to the determination of the severity of the sentence that should be imposed.<sup>117</sup> There is ample *travaux préparatoires* to show that the phrase “greatest responsibility” was intended to denote the political and military leadership or authority position of the accused as well as a sense of the gravity, seriousness, or massive nature of the crime.<sup>118</sup>

In other criminal tribunals, the level of responsibility of an accused is usually evaluated based on considerations such as his level of participation in the crimes, his hierarchical rank or position, and whether he acted in that capacity permanently or for a long period of time.<sup>119</sup> Based

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115. *Prosecutor v. Brima Appeals Judgment*, Case No. SCSL-04-16-A, ¶¶ 281–82.

116. *Id.* ¶ 282.

117. *UNSG Report*, *supra* note 28, ¶¶ 29–31, 36.

118. *See id.* *See also* U.N. Secretary-General, Letter dated Mar. 6, 2002 from the Secretary-General addressed to the President of the Security Council, Annex, Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, ¶ 28, U.N. Doc. S/2002/246 (Mar. 8, 2002); U.N. President of the Security Council, Letter dated Dec. 22, 2000 from the President of the Security Council to the Secretary-General, ¶ 1, U.N. Doc. S/2000/1234 (Dec. 22, 2000).

119. *Prosecutor v. Kaing Guek Eav*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 17–25 (July 26, 2010) (addressing the accused’s level of responsibility while also briefly examining the practice of the ICTY and the International Criminal Court in this regard); *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11bis with Confidential Annex A and Annex B, ¶¶ 27–28 (Int’l Crim. Trib. For the Former Yugoslavia) (Apr. 5, 2007), [http://www.icty.org/x/cases/milan\\_lukic\\_sredoje\\_lukic/tdec/](http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tdec/)



on such criteria, the SCSL would have had a better and more accurate picture of where a particular accused fell in the chain of command, including how many subordinates and superiors he may have had. This would be no different from the manner in which domestic criminal courts are asked to differentiate among offenders by rendering sentences within a specified range, depending on the gravity of the offence, the perceived harm to the victims and, crucially, the level of legal and moral blameworthiness of the offender.<sup>120</sup>

In any event, in international criminal trials, which focus on prosecuting the worst offenders, we often draw similar distinctions between the “big fish,” who masterminded or planned the atrocities, and the “small fish,” who merely executed them. Similarly, we intuitively attach a different level of blameworthiness, and sentences, to those who murder in the course of genocide as compared to those who carry out an assault on a prisoner of war, which might constitute a war crime in the context of an armed conflict. In sum, all these considerations speak to why the Court should have been more deliberate in its interpretation and application of the greatest responsibility personal jurisdiction requirement.

*B. Selective Prosecutions: Commanders, but  
What of the Profiteers?*

It is evident that the Prosecutor of the SCSL—especially David Crane who prepared the initial indictments—had an immensely difficult task<sup>121</sup> in determining whom to prosecute as bearing the “greatest responsibility” for the “serious violations”<sup>122</sup> of international humanitarian law committed in Sierra Leone. The widespread nature of the crimes, their brutality, and the large number of persons involved in their commission might have initially appeared overwhelming. Still, he undoubtedly had a wide margin of discretion to decide whom to indict. This decision would have been controlled by, amongst other factors, the quality of evidence available, the geographic spread of the crimes throughout Sierra Leone, and his professional assessment of his office’s ability to discharge the burden of proof beyond a reasonable doubt in a given case.

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en/070405.pdf; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-20-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, ¶ 22 (Feb. 10, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc530350.pdf>.

120. MODEL PENAL CODE: SENTENCING § 15 (Preliminary Draft No. 1, 2002).

121. Phoebe Knowles, *The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective*, 6 INT’L CRIM. L. REV. 387, 405 (2006) (noting the complexity of Article 1 of the Statute: “What this means in theory and, crucially, in practice, remains unresolved.”).

122. Statute of the Special Court for Sierra Leone, art. 1, ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 145.

As noted above, in deciding who to indict, the Court's Prosecutor essentially chose to focus on some of the political and military leaders from each of the combating parties: the rebel RUF; the CDF militia from the government side; and the rogue elements of the Sierra Leone Army that constituted the AFRC. In this context, former President Taylor is easily the highest profile and most important leader to have been charged before the SCSL. His case is thus the jewel in the Prosecutor's crown. Had Taylor not been indicted, or eventually arrested once indicted, many in Sierra Leone would have concluded that the Court was simply a failure.<sup>123</sup>

Prosecutor Crane has explained in one interview that he felt bound to charge those with greatest responsibility "who caused, sustained, aided and abetted the tragedy."<sup>124</sup> However, many Sierra Leonean victims of the war and the international public remain largely in the dark as to why certain individuals, within that range, were prosecuted instead of others.<sup>125</sup> They deserve to know. Though the Prosecutor does not have a legal obligation to explain his decision, there are significant legitimacy gains arising from greater transparency in how he was guided in that process—as is the practice of the Prosecutor of the International Criminal Court. It also helps to settle outstanding questions raised by some, such as the NGO Human Rights Watch, regarding why information obtained during the investigations was not used to prosecute additional persons in Sierra Leone.<sup>126</sup>

By its nature, the black box of prosecutorial discretion serves to fuel speculation. For instance, it is said that in addition to the group of eight individuals who were formally charged, and successfully prosecuted, many others may have also shared the greatest responsibility burden for the atrocities committed. These omissions were exacerbated by the fact that some known leaders never saw their days in court.<sup>127</sup> To

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123. Crane, *Terrorists, Warlords, and Thugs*, *supra* note 48, at 514 (describing one of the greatest challenges for the Court as "Mandate Enforcement"—essentially that the Court could only be successful if Charles Taylor was turned over).

124. Charles Cobb Jr., *West Africa: Nigeria Will Hand Over Charles Taylor, Predicts War Crimes Prosecutor*, ALLAFRICA (Sept. 24, 2003) (Interview by Charles Cobb Jr. with David Crane, Chief Prosecutor), <http://allafrica.com/stories/200309250972.html>.

125. For another vague statement of the Prosecutor that the formulation "greatest responsibility" narrowed the potential indictments "from 30,000 to around 20" with no further explanation, see Crane, *Terrorists, Warlords, and Thugs*, *supra* note 48, at 511–12.

126. HUMAN RIGHTS WATCH [HRW], BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE: ACCOMPLISHMENTS, SHORTCOMINGS, AND NEEDED SUPPORT 6 (2004).

127. Alie Kabba allegedly started as Qaddafi's contact person for Sierra Leonean revolutionaries, and Sankoh, amongst other activities, traveled with Kabba to Libya and met with Charles Taylor through Kabba. LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE 6, 49–52 (2005) (describing Sankoh as the leader

add insult to injury, while the Prosecutor indicted alleged rebel leaders like Foday Sankoh, Sam Bockarie, and the AFRC's Johnny Paul Koroma, they were never actually tried by the Court either because they died or disappeared.<sup>128</sup> In fairness, these outcomes do not appear to be a fault of the prosecution.

Serious criticisms can also be made about the extremely small number of trials. President Kabbah had stated his initial expectation that with a jurisdictional provision focused on those most responsible, the number of persons tried could be limited to "dozens."<sup>129</sup> At a minimum, dozens suggest twenty-four to thirty-six people and potentially even more. Similarly, Ralph Zacklin, the legal counsel to the United Nations who negotiated the SCSL Agreement reportedly stated in September 2000 that between twenty-five and thirty persons were expected to be prosecuted before the Court.<sup>130</sup> The former British High Commissioner in Sierra Leone, who played a pivotal role supporting the democratically elected Kabbah government during the rebel invasion of Freetown in January 1999, estimated between fifteen and thirty.<sup>131</sup>

Prosecutor Crane has suggested that the "greatest responsibility" formula narrowed his list of suspects from 30,000 individuals to about twenty.<sup>132</sup> His reasoning is highly problematic. For one thing, he insinuates that all combatants in the Sierra Leone war could have been prosecuted. This is simply not the case because of the limited personal jurisdiction captured by the greatest responsibility idea. As seen earlier, that formulation was the result of a political compromise among the powers that be in the international community. Still, in the end, it was up to him to decide the specific numbers of persons to prosecute based on his prosecutorial strategy and his understanding of the jurisdictional parameters set out in the statute.<sup>133</sup>

The SCSL Prosecutor basically failed to meet Sierra Leonean expectations of internationally-supported justice as only thirteen

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of the RUF and Kabba as one of the first inciters. It was Kabba's expulsion from school due to his virulently pro-Qaddafi student organization that led him to initiate "something that would have a profound and destructive result much later: the training of would-be revolutionaries in Libya in preparation for an armed assault against the APC state"). See also Ibrahim Abdullah, *Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone*, 36 J. MOD. AFR. STUD. 203, 214 (1998).

128. As discussed earlier, the deaths of Sankoh and Bockarie led to the withdrawal of their indictments.

129. Kabbah Letter to UNSC, *supra* note 3, Enclosure § 4.

130. HRW, *supra* note 126, at 20–21 n.79.

131. Peter Penfold, *Will Justice Help Peace in Sierra Leone?*, OBSERVER (U.K.), Oct. 20, 2002, available at <http://www.guardian.co.uk/world/2002/oct/20/sierraleone.theworldtodayessays>.

132. See Crane, *Terrorists, Warlords, and Thugs*, *supra* note 48, at 508–09, 511–12.

133. See *id.* at 511–12.

indictments have been formally issued in a court that operated for about ten years. Though there could always be sealed indictments, it seems highly unlikely that this number will change in the Court's drawdown phase. With Norman's passing during his trial, this means that of the thirteen people for whom the prosecution successfully sought indictments, only nine were ultimately tried. According to one commentator, before Taylor was arrested, if the Prosecutor was attempting a top to bottom approach of determining greatest responsibility, the number of suspects and accused *missing* render the indictment list "an unusually bottom-heavy picture."<sup>134</sup> Taylor's arrest and trial does not appear to significantly change that critique, even if it mitigates it somewhat. On this view of the import of greatest responsibility, we are left with what appears to be one person at the apex of the pyramid, one or two persons in the middle, and the rest at or near the very bottom.

The formal leadership position of an individual is obviously important. However, it is not the only indicia of bearing the greatest responsibility. Human Rights Watch has rightly argued, for instance, that some persons who may not have been at the top of the chain of command, but who stood out from their colleagues because of the excessive brutality of their crimes against civilians, also deserved prosecution.<sup>135</sup> Some activists have even gone as far as offering names of individuals that could have been indicted. In this vein, allegedly brutal regional and field commanders such as Alhaji Bayo, Bai Bureh,<sup>136</sup> Musa Junisa, Savage,<sup>137</sup> and Adama "Cut Hand,"<sup>138</sup> who allegedly

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134. Knowles, *supra* note 121, at 406–07 (considering the two options of a top-down or threshold line approach to determining those who bear the greatest responsibility).

135. HRW, *supra* note 126, at 19–20.

136. According to a key witness, Commander Tall Bai Bureh led the RUF attack on Guinea. Transcript of Record, Prosecutor v. Taylor, Case No. SCSL-2003-01-T, 5339–40 (Mar. 5, 2008), <http://www.sc-sl.org/LinkClick.aspx?fileticket=dqt1yErflOo=&tabid=160>.

137. Cockayne, *The Fraying Shoestring*, *supra* note 101, at 643 (noting the common critique that the net should have been cast wider to include persons such as Savage, Musa Junisa and Alhaji Bayo).

138. HRW, *supra* note 126, at 20 (suggesting names of those who might have been prosecuted). There are also multiple references to the brutality of Adama "Cut Hand" from witnesses at the SCSL. Transcript of Record, Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-2004-15-T, 91 (Oct. 19, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=KIEEas6mTg8%3d&tabid=156> ("At all times when we go on operation, she goes and takes [killings] as her hobby. [Killings not for military purposes but for] black magic and . . . the personal enjoyment of an SLA woman named Adama Cuthand"); Transcript of Record at 99 Prosecutor v. Charles Taylor, Case No. SCSL-2003-03-01-T, 38064–66 (Mar. 25, 2010), <http://www.sc-sl.org/LinkClick.aspx?fileticket=jvOWeVJQTX0=&tabid=160>. For a summary of some of the testimony about Adama "Cut Hand," see KIRAN GREWEL, UNIV. OF CAL.

initiated and specialized in civilian amputations, apparently escaped prosecutorial attention largely because of the Prosecutor's overly narrow interpretation of his jurisdiction, which in turn, seemed to have been driven by concerns about the limited funding available to the Court.<sup>139</sup>

There are also senior military commanders and operatives hailing from West African countries, such as Liberia and the Gambia, who may have also planned and carried out atrocities. At least some of them would arguably fall within the narrow leadership-collaborator group that President Kabbah cited when he requested U.N. support for the creation of a special tribunal.<sup>140</sup> Perhaps more importantly, if we accept the Prosecutor's allegations that many of the peddlers of violence "were graduates of the terrorist training camps in Libya" working towards Libya's master plan to create a "fiefdom" in Sierra Leone and West Africa through the provision of training and logistics for the RUF, then perhaps President Muammar al-Qadhafi should have also been on the docket to answer charges.<sup>141</sup> By the same token, President Blaise Compaoré of Burkina Faso, who is said to have also provided weapons, training, and logistics to the rebels, might have also been indicted.<sup>142</sup> Indeed, Crane has claimed that those leaders were unindicted co-conspirators of Taylors.

The problem with these grave public allegations by human rights groups and former Prosecutor Crane is essentially one of proof. As a threshold matter, though indictments were never issued, they may constitute violations of the presumption of innocence. In addition, as charges were never brought, we have no way of determining whether, for example, there is credible evidence supporting the claim that any of these individuals aided or abetted the commission of international crimes during the relevant temporal jurisdiction (i.e. after November 30, 1996). Neither can we determine whether there is sufficient evidence of the req-

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BERKELEY WAR CRIMES STUDIES CTR., SPECIAL COURT MONITORING PROGRAM UPDATE #82 (2006), available at [http://socrates.berkeley.edu/~warcrime/documents/Report82\\_001.pdf](http://socrates.berkeley.edu/~warcrime/documents/Report82_001.pdf).

139. See HRW, *supra* note 126, at 4 ("Human Rights Watch has concerns about aspects of the Special Court's operations that are hampering its work, many of which directly relate to inadequate funding of the court by donors.").

140. See Kabbah Letter to UNSC, *supra* note 3, at 2.

141. See Crane, *Terrorists, Warlords, and Thugs*, *supra* note 48, at 506; see also Clarence Roy-Macaulay, *UN-Backed Court Alleges Liberian, Libyan Backing as First Sierra Leone Rebels Go on Trial*, ASSOCIATED PRESS, July 22, 2004 (noting that Prosecutors described a network of foreign support for the rebels, including the training and forces from Muammar el-Qaddafi, who was mentioned in the Court's indictments).

142. See Cobb, *supra* note 124, at 4 (citing Prosecutor Crane as having referred to the "worldwide criminal investigation" of the SCSL, explained that the conflict was regional and international, and noted his international mandate expands throughout West Africa. Cobb followed by asking: "How nervous should I be if I am, say, the president of Burkina Faso?" The Prosecutor evaded the question: "We're looking at everyone neutrally and fairly and again, following the evidence wherever it may lead.").

quisite criminal intent and knowing participation of any of these individuals in the perpetration of war crimes, crimes against humanity, or other serious violations of international humanitarian law in Sierra Leone.

To be fair to the Prosecutor, of course, having evidence is one thing, but deciding to seek an indictment based on that evidence is another. Perhaps he had information against certain personalities that could support a *prima facie* case for the issuance of an arrest warrant. But he could still choose not to proceed for other reasons. For instance, in a sovereignty conscious world, it is hard for any international prosecutor to indict three sitting heads of state (Qadhafi and Compaoré, in addition to Taylor), even putting aside potential difficulties with head of state immunity. While we could speculate that he could have had a strong legal case, the political fallout from such actions might, in his judgment, have been too big a burden for the fledgling Sierra Leone tribunal to handle.<sup>143</sup> Indeed, Crane has noted the tendency of international politics to “blow back” and obstruct international justice when attempts are made to prosecute heads of government.<sup>144</sup> It is therefore not far-fetched to speculate that this could have been a factor in his assessment of whom he could prosecute.

Other important factors would also be relevant in decisions on whether or not to proceed. For instance, pragmatic questions of state cooperation could arise regarding the likelihood that a particular state would be pressured by the Security Council and the international community to hand over its leader to the Court for prosecution. This is not trivial considering the stormy state-centric seas that all international criminal tribunals must navigate to achieve even the most basic things that mature municipal criminal justice systems can take for granted; for example, the issuance and enforcement of an arrest warrant. Viewed in this light, to the extent that there is a reasoned legal basis for his decision, rather than other improper motives, it would be hard to blame the Prosecutor as reasonable minds could differ on such strategic assessments.

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143. While restraining himself from issuing indictments, the Prosecutor has in some ways indulged by creating a political stage of the courtroom. Scholars critique the Prosecutor as having “strongly over-stated the connections” (i.e., between combatants and Libya and al Qaeda) and for giving the impression that the Office of the Prosecutor is a “staging-base” for U.S. foreign affairs and intelligence. Cockayne, *The Fraying Shoestring*, *supra* note 101, at 656.

144. David M. Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts*, 37 CASE W. RES. J. INT'L L. 1, 7 (2005) [hereinafter Crane, *Dancing with the Devil*] (noting that this “can lead to odd and frustrating results”).

Besides military commanders and heads of state, also clearly missing from the above list were the Belgian, Dutch, Italian, Israeli, Lebanese, and other foreign businessmen and profiteers who allegedly played an equally critical role by financing the war from a distance and amassing the loot.<sup>145</sup> These are, in many ways, the real financial beneficiaries of the war. Indeed, the role of diamonds in fuelling the death and destruction that took place in Sierra Leone appears to be well documented.<sup>146</sup> Thus, many informed Sierra Leoneans would question whether there is true justice where the foreign individuals and the primarily Western corporations that apparently benefited the most from their country's ruin, such as the diamond oligopoly DeBeers, remained untouched.<sup>147</sup> Although the SCSL only has jurisdiction to prosecute natural but not legal or corporate persons, it is evident that there is nothing in the Statute of the Court that would have prevented bringing charges against foreign corporate executives deemed to bear the greatest responsibility for their aiding and abetting as well as complicity in war crimes and crimes against humanity.<sup>148</sup>

Ironically, in an effort to be fair in issuing indictments, the Prosecutor went too far the other way. Whereas he was under-inclusive in whom he decided to prosecute, he was over-inclusive in respect of those that he chose to prosecute. He indicted people that, in the context of Sierra Leone, seemed difficult for the population to accept.<sup>149</sup> In fact, according

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145. In many public speeches, David Crane has alleged that the following foreign businessmen and individuals belonged to what he alleges is a "West African Joint Criminal Enterprise," all of whom he claims were associated with Taylor: Sammy Osally; Ibrahim Bah; Victor Bout; Vladimir Menin; Aziz Nasur; and Gus Kouwenhoven. See, e.g., David M. Crane, Professor, Syracuse Univ. College of Law, *The Triumph of Good Over Evil . . . The Investigation, Indictment, and Arrest of Charles Taylor: A Regional Approach to Justice*, Speech at Buffalo Law School (Feb. 17, 2010) (on file with author). One of those cited by Crane, Gus Kouwenhoven, was recently prosecuted in the Netherlands but was acquitted. For an excellent comment on the proceedings before the Dutch courts, see Larissa van den Herik, *The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia*, 9 INT'L CRIM. L. REV. 211 (2009). Though vacating the post a few years ago, he appears to have continued in the role as a shadow SCSL prosecutor.

146. See *supra* note 4 and accompanying text.

147. See, e.g., SMILLIE ET AL., *supra* note 4, at 11–12.

148. The International Commission of Jurists recently released a formidable study discussing corporations and the accountability question. See 1 INT'L COMM'N JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES: FACING THE FACTS AND CHARTING A LEGAL PATH, available at [http://icj.org/IMG/Volume\\_1.pdf](http://icj.org/IMG/Volume_1.pdf).

149. E.g. INT'L CRISIS GRP., THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS OF A "NEW MODEL" 5–6 (2003) [hereinafter ICG, PROMISES AND PITFALLS] ("Many

to some scholars, in their “sincere attempt at balanced prosecution,”<sup>150</sup> the Prosecution might have been too daring for the delicate political balance necessary in the post-conflict society.<sup>151</sup>

To be clear, I do not question the legality of the warrants, especially given the Appeals Chamber position that decisions regarding whom to prosecute must more or less be made by the Prosecutor. Rather, I merely challenge the propriety of issuing certain warrants, such as those against leaders of the CDF, like Norman,<sup>152</sup> the Deputy Defense Minister to President Kabbah. Many Sierra Leoneans are resentful that their “hero” was prosecuted.<sup>153</sup> The man who sacrificed so much to stop rebel atrocities was perceived by many as a national hero deserving of a medal of honor. Not only was he denied such recognition; he was rewarded with prosecution for international crimes for the excesses of the militia that he oversaw.<sup>154</sup> The ultimate irony being that Norman was jailed with his former enemies in the same detention facility.

Others are angered that his boss, the President, who gave him orders and who doubled as Defense Minister, was spared while he took the fall. The doctrine of command responsibility enshrined in the Statute of the SCSL suggests that to the extent that liability would have been found on the part of Norman for the activities of the CDF militia, Kabbah, his boss, would also share at least a measure of that responsibility.<sup>155</sup> Sierra

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Sierra Leoneans were shocked by the arrest of Sam Hinga Norman . . . who fought for the government against the RUF and AFRC junta.”).

150. Schabas, *Prosecutorial Discretion*, *supra* note 80, at 750 (“Perhaps the most sincere attempt at balanced prosecution came from the Prosecutor of the SCSL. He issued three clusters of indictments, each directed at a different group in the conflict, including the government-supported Civil Defence Forces.”).

151. See Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730, 742–43 (2004) (discussing Norman’s indictment as illustrating “the complexity of conflict . . . and the difficulty of constructing new governments unburdened by past crimes and old allegiances,” as the CDF were initially defenders of the people against the rebels).

152. *Id.* at 742 (referring to this as “the most daring indictment”).

153. See William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 43 (William A. Schabas & Shane Darcy eds., 2004) [hereinafter Schabas, *A Synergistic Relationship*] (“Norman’s arrest stunned many Sierra Leoneans who see him as a hero for his role in the war against the Revolutionary United Front.”). In addition to my own personal interviews, there are documented interviews conducted by other organizations, such as the International Crisis Group, revealing similar sentiments. ICG, PROMISES AND PITFALLS, *supra* note 149, at 6 n.36 (“All individuals interviewed stated that they ‘felt bad’ about their leader being indicted as they consider him a national hero who stood up first against all armed groups attacking defenseless civilians. However, they consistently said that the CDF were not made ‘to fight for Norman, but to fight for the country’, and they did not view the Special Court as a threat to government or nation.”).

154. Schabas, *A Synergistic Relationship*, *supra* note 153, at 43.

155. In the SCSL, like other international criminal tribunals, the fact that crimes were



Leoneans seem to appreciate the intuitive elements of that legal concept. The issue of command responsibility was further complicated by low politics and the political ambitions and rivalries of the personalities involved. Norman was from the majority Mende ethnic group and had long held the desire to run for political office to replace President Kabbah as leader of the then governing Sierra Leone People's Party (SLPP).

On the other hand, Kabbah had a different idea of who should replace him as party leader: Solomon Berewa.<sup>156</sup> Berewa, who was Minister of Justice when the SCSL was established and thus played an important role in its creation, later became vice president. Kabbah nominated Vice President Berewa, also from the Mende ethnic group, to succeed him.<sup>157</sup> Largely because of popular disquiet about Norman's arrest, and a split Mende vote in the south of Sierra Leone (where the ethnic group constitutes the majority), the incumbent SLPP candidate lost the election.<sup>158</sup> Taken together, these factors explain why Norman's arrest and prosecution was perceived as a deeply political act among Sierra Leoneans. The anger over the way he was treated was almost palpable in most parts of the country.

At the same time, some war victims groups would probably have celebrated the decision to move against the CDF leader. In a country where justice is largely discredited because of a long history of judicial corruption, patronage, and executive interference, for the first time in their lives, they would have seen a rare sight suggesting truth to the adage that justice is blind. They also would have seen that no one, no matter how powerful or popular, is above the law in Sierra Leone. Such views would have found support in the findings of the truth commission

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committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Statute of the Special Court for Sierra Leone, art. 6, ¶ 3, Jan. 16, 2002, 2178 U.N.T.S. 145. For an excellent work on this doctrine, see GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* (2009).

156. Lans Gberie, *A Chat With Former President Ahmad Tejan Kabbah*, *THE PATRIOTIC VANGUARD* (May 28, 2009), [http://www.thepatrioticvanguard.com/article.php3?id\\_article=4196&cid=0&ei=Llg7StrRK4mQ9QsXnPGfCA](http://www.thepatrioticvanguard.com/article.php3?id_article=4196&cid=0&ei=Llg7StrRK4mQ9QsXnPGfCA) [hereinafter Gberie, *A Chat With Former President Kabbah*] (reporting Kabbah's statement that he nominated his successor).

157. *Id.*

158. See Editorial, *Tejan Kabbah's Hand-Picked Successor Losing: Any Lessons From Presidential Race in Sierra Leone?*, *STATESMAN* (Ghana), Sept. 4, 2007, [http://www.thestatesmanonline.com/pages/news\\_detail.php?newsid=4636&section=1](http://www.thestatesmanonline.com/pages/news_detail.php?newsid=4636&section=1); Gberie, *A Chat With Former President Kabbah*, *supra* note 156. For an academic analysis of the outcome of the Sierra Leonean general elections, in which power was peacefully transferred to the opposition, see Christopher Wyrod, *Sierra Leone: A Vote for Better Governance*, 19 J. DEMOCRACY 1, 70 (2008).

which did not exonerate the same militia, especially the *kamajors* that Norman headed, from responsibility for heinous wartime atrocities. It would also of course find support in the catalog of unspeakable horrors described in the Court's CDF judgment. Morality and politics aside, there is no question that some in the militia committed international crimes. From a positivist lawyer perspective, the decision to indict CDF leaders could probably withstand the tough scrutiny it has received.

Whatever the case, of the rebels who were ultimately indicted and tried, some had come to play a critical role as ambassadors of peace toward the end of the war. There is therefore a measure of popular discomfort with their prosecutions among certain sectors of the population in Sierra Leone. For instance, many Sierra Leoneans credit Issa Sesay, the first accused in the RUF Trial, with singlehandedly helping end the hostilities.<sup>159</sup> Sesay's renown came when the elusive and unreliable Sankoh was arrested for undermining the peace process. Sesay, who proved to be more trustworthy and predictable, was asked to replace him as interim RUF leader.<sup>160</sup> The new leader's efforts to help the government demobilize and disarm the rebel combatants, at great personal risk, earned him the moniker "liberator who brought peace to the country."<sup>161</sup>

Despite the depravations visited upon the civilian population by the RUF during a decade of hostilities, and despite his indictment by the SCSL, Sesay's support persisted, according to the International Crisis Group. Many youth apparently indicated that they would have wished to demonstrate peacefully in support of him.<sup>162</sup> The way he was treated became more disturbing to some given the evidence of prosecutorial abuse of process that surfaced during his trial.<sup>163</sup>

Ironically, Sesay, who helped to usher peace, was prosecuted while other senior RUF commanders who ardently fought but failed to succeed in scuttling the peace process were spared. In a cruel stroke of fate, some of these commanders became known Prosecution witnesses against Sesay. They thereby benefited from the financial largesse of the Court through the witness support section. The decision not to prosecute some

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159. *Sierra Leone President Lauds Rebel Leader's Contribution to Peace: UN Mission*, UN NEWS CTR., Sept. 4, 2001, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=1456> (noting the President's "special mention of General Sesay's contribution to the peace process"). See also ICG, PROMISES AND PITFALLS, *supra* note 149, at 5.

160. ICG, PROMISES AND PITFALLS, *supra* note 149, at 5.

161. *Id.*

162. *Id.* at 5 n.31 (reporting that they did not protest for fear of being stopped by the authorities).

163. PENELOPE VAN TUYL, UNIV. OF CAL. BERKELEY WAR CRIMES STUDIES CTR., EFFECTIVE, EFFICIENT, AND FAIR? AN INQUIRY INTO THE INVESTIGATIVE PRACTICES OF THE OFFICE OF THE PROSECUTOR AT THE SPECIAL COURT FOR SIERRA LEONE 45 (2009).

of these known perpetrators arguably contravened the explicit mandate in Article 1(1) of the Statute to prosecute "those leaders . . . who [had] threatened the establishment of and implementation of the peace process in Sierra Leone."

Some commentators have suggested that prosecuting the different factions equally, with an apparent lack of bias between the groups, helped to divert some of the real culpability from the international community. They argue that the attempt at a well-rounded prosecution effectively enabled "the international community to simply cast all of the combatants as criminal, and thus avoid difficult questions about the international community's own failure to defend democracy and intervene in the region."<sup>164</sup> The point is that the Prosecutor's strategy could be criticized from a range of perspectives. Nevertheless, whether it was intended to provide a cover for presumed Western guilt for the failure to intervene in Sierra Leone is a harder argument to substantiate.

### *C. Shoestring Justice: Trials and Tribulations*

As the SCSL trials progressed, serious critiques emerged regarding the lack of funding hampering the Court's work in various ways. It definitely impacted the number of people that the Prosecutor felt capable of indicting for what happened in Sierra Leone.<sup>165</sup> Thus, in some respects, it is unfair to blame the Prosecution instead of the GoSL and the Security Council for overly limiting the number of cases that can be tried by, firstly, devising such narrow personal jurisdiction, and secondly, starving the SCSL of the funds required by opting for a volatile and uncertain funding structure for its operations. The lack of funds led to many other issues, some of which affected the legitimacy of the Court. For example, outreach work, which was important for communicating the trial processes to the local population, was initially frustrated by a lack of money.<sup>166</sup> This created a distance between the tribunal and the local population.

Similarly, the funding mechanism became the subject of a preliminary jurisdictional challenge as some of the defendants filed petitions claiming that the donations-based system effectively compromised the independence of the judges and therefore the SCSL as a whole. The

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164. Knowles, *supra* note 121, at 408.

165. See HRW, *supra* note 126, at 4–6.

166. Amnesty Int'l, Statement to the National Victims Commemoration Conference: Freetown, 1 and 2 March 2005, at 2 (Mar. 1, 2005), available at <http://www.amnesty.org/en/library/info/AFR51/002/2005/en>.

judges rejected that claim with reasoning that, at best, leaves some serious room for debate.<sup>167</sup>

But, as will be discussed in the next subsection of this Article, there is no other area where the shoestring budget of the Court hampered operations more than the meager resources allocated to the defense of the accused.<sup>168</sup> Before turning to that argument, I will first consider the effectiveness of justice on a shoestring budget and the available alternatives in light of the early expectation that the Court's model would be more efficient as compared to the Chapter VII tribunals.<sup>169</sup>

Dissatisfaction with the ICTY and ICTR's inefficiency<sup>170</sup> largely spawned the SCSL's unique mode of funding as well as its timeline. Against the Secretary-General's suggestions,<sup>171</sup> the Security Council insisted on establishing a tribunal based on voluntary contributions by

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167. Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence) (Mar. 13, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=R/quLHDjK/A=&tabid=193> (rejecting the challenge that judicial independence was conflicted by the operations of the Management Committee, which comprises representatives of donor states, and might use their economic power to interfere with the justice delivered); John R.W.D. Jones et al., *The Special Court for Sierra Leone: A Defence Perspective*, 2 J. INT'L CRIM. JUST. 211, 223 (2004) ("There is thus a clear avenue for outside forces to influence adjudication by means of economic manipulation."). The Appeals Chamber reasoned that the precarious funding structure of the SCSL cannot reasonably be seen to result in any real likelihood of bias in relation to the trials before the judges. The judicial remuneration, which was fixed for three-years, was not tied to the SCSL's funding by donor states; nor can it be subject to some form of manipulation to secure a particular result. The problem is that the Court did not only operate for three years. Further, in practice, the Court, especially the President (an Appeals Chamber judge) and the Prosecutor, had to constantly be on the road to fundraise. The funding drive emphasized progress of the various trials to justify further donations to the tribunal. The fact that judicial remuneration was part of the Court's budget could raise apprehension by a reasonable observer about potential links between the funding and outcomes of the trials. In the final analysis, the matter is not as clear cut as the Appeals Chamber decision indicated.

168. See Cesare P.R. Romano, *The Price of International Justice*, 4 L. & PRAC. INT'L CTS. & TRIBUNALS 281, 304–05 (2005) (describing that generally in criminal law, budget squeezes pressure prosecutors to taper down indictments, leading to delays in trial and arrests as well as other interruptions. "[W]hen the budget gets tight the first to pay the price are usually those who cannot complain: defendants and victims").

169. See Cockayne, *The Fraying Shoestring*, *supra* note 101, at 624; Dougherty, *supra* note 100, at 311 (noting the Security Council's determination to find a new model, and how the SCSL represents the "attempt to right-size" international criminal law).

170. See Helena Cobban, *International Courts*, FOREIGN POL'Y, Mar.–Apr. 2006, at 22, 23 (noting the Chapter VII Tribunals' "ballooning" timelines and costs); Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 542–43, 545 (2004) (stating that it is "generally recognized" that the Tribunals "are unwieldy instruments, with a cumbersome bureaucratic structure" and that they "have been too costly, too inefficient and too ineffective") (emphasis in original).

171. UNSG Report, *supra* note 28, ¶ 71 ("In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding.").

third party states with operational oversight through a Management Committee.<sup>172</sup> In practice, this meant the success of the Court depended upon the level of funding that it could generate from U.N. members. Likewise, at the time of its creation, the SCSL was expected to operate for three years.<sup>173</sup> Thus, the consequence of the transfer of financial responsibility for the Court to third party countries was a gap between the SCSL and those most invested in its mandate and success (i.e., its founders: the United Nations and the GoSL).

Let us now compare the cost of the SCSL against that of the Chapter VII tribunals, focusing on the ICTR. As of December 2009, the ICTR had spent about \$1.4 billion<sup>174</sup> and the ICTY, \$1.79 billion.<sup>175</sup> For that money, the ICTR completed trials<sup>176</sup> for fifty-two accused (ten still

172. U.N.-Sierra Leone Agreement, *supra* note 30, art. 6–7.

173. U.N. Secretary-General, Letter dated Jan. 12, 2001 from the Secretary-General to the President of the Security Council, ¶ 12, U.N. Doc. S/2001/40 (Jan. 12, 2001).

174. Calculated based on the expenditure of the ICTR as provided in the financial report and audited financial statements for the biennium and reports of the Board of Auditors data covering 1996–2007. Note that this figure only covers the costs from 1996, rather than 1994. *ICTR Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2009*, U.N. Doc. A/65/5/Add.11; GAOR, 65th Sess., Supp. No. 5K (July 16, 2010); *ICTR Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2007*, U.N. Doc. A/63/5/Add.11; GAOR, 63d Sess., Supp. No. 5K (2008); *ICTR Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2005*, U.N. Doc. A/61/5/Add.11; GAOR, 61st Sess., Supp. No. 5K (July 28, 2006); *ICTR Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2003*, U.N. Doc. A/59/5/Add.11; GAOR, 57th Sess., Supp. No. 5K (July 3, 2002); *ICTR Financial Report and Audited Financial Statements for the Biennium Ended 31 December 1999*, U.N. Doc. A/55/5/Add.11; GAOR, 55th Sess., Supp. No. 5K (July 11, 2000) (providing financial reports and audited financial statements for the bienniums of 1996–97 and 1998–99).

175. Calculated based on the expenditure of the ICTY as provided on the ICTY website covering 1993–95 added with the financial report and audited financial statements for the biennium and reports of the Board of Auditors data covering 1996–2009. *ICTY Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2009*, 26, U.N. Doc. A/65/5/Add.12; GAOR, 65th Sess., Supp. No. 5L (June 25, 2010); *ICTY Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2007*, 19, U.N. Doc. A/63/5/Add.12; GAOR, 63d Sess., Supp. No. 5L (Aug. 13, 2008); *ICTY Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2005*, 16, U.N. Doc. A/61/5/Add.12; GAOR, 61st Sess., Supp. No. 5L (Sept. 27, 2006); *ICTY Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2003*, 20, U.N. Doc. A/59/5/Add.12; GAOR, 59th Sess., Supp. No. 5L (Aug. 10, 2004); *ICTY Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2001*, 26, U.N. Doc. A/57/5/Add.12; GAOR, 57th Sess., Supp. No. 5L (July 5, 2002); *ICTY Financial Report and Audited Financial Statements for the Biennium Ended 31 December 1999*, 17, U.N. Doc. A/55/5/Add.12; GAOR, 55th Sess., Supp. No. 5L (July 11, 2000) (reporting data for the biennium of 1996–97 as well as 1998–99); *The Cost of Justice*, U.N. ICTY, <http://www.icty.org/sid/325>.

176. These figures do not include trials in which the accused died prior to the completion of proceedings, trials transferred according to Rule 11bis procedures, or trials that never began because of indictments being withdrawn.

on appeal) with trials for another twenty-two in progress.<sup>177</sup> The ICTY, which was established a year earlier, achieved a considerably better record: it completed trials for 125 accused, with trials for another thirty-six in progress.<sup>178</sup> For only completed cases, we are left with a significant price tag: about \$26 million per accused in the ICTR, and around \$19 million per accused in the ICTY.<sup>179</sup>

Not surprisingly, the Rwandan government, a key beneficiary of the ICTR's work, has been very critical of its high expenditures. As the total budget soared near the 1 billion dollar mark, Kigali criticized the tribunal's paltry twenty-seven judgments.<sup>180</sup> Rwandan President Paul Kagame and other senior officials disparaged the tribunal for having "disposed" of over \$1.5 billion with less than forty verdicts in eleven years.<sup>181</sup> In a letter to the Security Council, Rwanda noted its serious "misgivings" about the ICTR.<sup>182</sup> To them, the ICTR had proven to be an "enormous and expensive undertaking" and the pace of its trials was "totally unacceptable, given the financial and human resources at its disposal."<sup>183</sup> Ultimately, in Kigali's view, the extremely slow pace of its proceedings had "adversely affected" the perception of the justice that it rendered both within and outside Rwanda.<sup>184</sup>

It appears that part of the criticism of the ICTR's expenditures likely comes from frustration over Rwandan government hopes to "regain full national ownership of the process of administration of justice for crimes committed during the genocide."<sup>185</sup> However, it is not just ICTR expenses

177. War Crimes Research Office at Am. Univ. Wash. Coll. Of Law, *Status of Cases*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx>.

178. *Key Figures of ICTY Cases*, U.N. ICTY, <http://www.icty.org/sections/TheCases/KeyFigures>.

179. These numbers provide very loose estimates. In 2008, Rupert Skilbeck estimated that the ICTR and ICTY cost \$10–15 million per accused. Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RTS. BRIEF 6, 6 (2008). If my calculations included *all accused*, including those who died before completion of trial, those for whom indictments were withdrawn, those accused whose proceedings were transferred, and those still in trial, the ICTR cost per person would be about \$17 million and the ICTY, about \$11 million.

180. *Cost of the ICTR to Reach One Billion USD By the End of 2007*, HIRONDELLE NEWS AGENCY (Tanz.), May 12, 2006, <http://www.hirondellenews.com/content/view/3716/26>.

181. *Id.*

182. Letter dated July 26, 2002 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, 6, U.N. Doc. S/2002/842 (July 26, 2002).

183. *Id.*

184. *Id.* at 7 ("The speed at which the ICTR operates is totally unacceptable, given the financial and human resources at its disposal").

185. Stephanie Nieuwoudt, *Rwandan Tribunal Under Pressure to Wind Up*, THE NEW TIMES (Rwanda) (Jan. 24, 2007), <http://iwpr.net/report-news/rwandan-tribunal-under-pressure-wind> (quoting Rwandan U.N. representative Joseph Nsengimana in a speech to the Security

or the views of the Kagame Government that have made such large budgetary expenditures questionable. Some have even condemned international criminal court processes more generally by arguing in favor of seemingly better and cheaper alternatives to trials such as truth commissions.

Other relevant comparisons between the Court and internationalized, or hybrid, criminal trials can and have been made. According to one commentator, in 2008, the Cambodia Tribunal had a budget of about \$36 million per accused,<sup>186</sup> well above the costs of any of the other international trials. At the other extreme, the mixed court for Bosnia and Herzegovina (BiH) was running at \$709,000 per trial, an amount projected to decline in the near future.<sup>187</sup>

Based on numbers alone, as compared to the Chapter VII tribunals, the Security Council's expectation of a cheaper court have, in many ways, been met by the SCSL. Besides shifting the burden of its cost to interested U.N. member states instead of using the resources of the organization as a whole, the Court, with a total budget amounting so far to only about \$208.7 million,<sup>188</sup> has clearly been a significantly less expensive endeavor than the ICTR and the ICTY.

The next logical question is: what did the Court achieve with its shoestring budget? In practical terms, the SCSL has completed trials for only eight individuals and still has one (Taylor) in progress.<sup>189</sup> Thus, as the remaining trial effectively concluded in February 2011, as noted earlier, the SCSL still costs about \$23 million per trial for each accused. It thus costs slightly lower than the total ICTR price per trial and slightly higher than that of the ICTY.<sup>190</sup> Overall, even though its total budget is much lower, given the relatively low number of persons it ultimately prosecuted over the course of nine years, the Court turns out to not be significantly more cost efficient than the other Chapter VII courts.

One might then ask a different question: would it not have been better to hold domestic trials in the national courts of Sierra Leone? Probably. Could those have been more cost efficient? Yes, they likely would have been. Still, the unique mandates of the ad hoc tribunals and the involvement of the international community rightly generate the

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Council). *See also* Letter dated July 26, 2002 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, *supra* note 182, at 12 (describing the ICTR crossroads, and how it necessitates the transfer of cases to Rwanda, or at the very least, the ICTR holding some trials inside Rwanda).

186. Skilbeck, *supra* note 179, at 6.

187. *Id.*

188. *See infra* note 253 and accompanying text.

189. *See supra* Part II.

190. If my calculations included those accused that died before completion of trial (Norman and Sankoh), the SCSL cost per person would be slightly lower.

expectation that tribunals like the SCSL will provide a certain type of justice that might not have been possible in national trials in a post-conflict context. Fair trials in international criminal tribunals have proven to be slow to achieve vis-à-vis domestic prosecutions for many reasons. These include the unique nature and large scale crimes prosecuted at the international level. There is, of course, obviously room for serious improvements in the efficiency of international prosecutions. However, it may be that the need for fairer trials is not necessarily compatible with the concept of speed as a determinant of greater cost efficiency.

Consider for instance the ICTY's struggle to deal with a sudden rush of defendants in custody. The tribunal resorted to plea-bargaining, apparently to meet the demands of the time limits imposed by the Security Council completion strategy.<sup>191</sup> Although early U.S. proposals anticipated such a mechanism would be available to the tribunal because they were seen as tools for securing more efficient prosecutions and ultimately convictions, they were initially rejected as "incompatible with the unique purpose" of such internationally supported courts.<sup>192</sup> However, by the time Judge Antonio Cassese was replaced by United States Judge Gabrielle Kirk McDonald, the new ICTY President faced many more in-custody defendants than had her predecessor.<sup>193</sup>

The colloquial "bang for the buck" as measured by cost per conviction is improved exponentially by plea bargains. Nevertheless, these mechanisms may not be aligned with the idea that international trials should help to create a historical record. Neither does it sit well with the ambitious goal of international criminal law to dispense credible justice on behalf of the primary victims of mass atrocity crimes.<sup>194</sup> Consequently, pressures that a certain quantity of justice be served by a certain deadline—in the case of the SCSL, three years—prove to be at grave odds with victims' expectations as well as those of the courts set up to dispense justice in their name.

Whether or not domestic trials were or are a more viable option—as the government of Rwanda ardently argues in the ICTR situation and the BiH evidence supports in Bosnia<sup>195</sup>—depends largely on the strength of

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191. Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. 1070, 1074 (2004).

192. *Id.* at 1073.

193. *Id.* at 1074.

194. *Id.* at 1071.

195. For instance, the hybrid court in Bosnia and Herzegovina (BiH) is partially funded by the Ministry of Justice and partially by voluntary contributions. According to Skilbeck, the difference explaining the budgetary efficiency between the BiH and the other international criminal courts is that the BiH has eight courtrooms and fifty-three judges, and thus, is able to



the comparator national justice system. In Sierra Leone, the Ministry of Justice is accorded only a very small fraction of an otherwise modest national government budget. For instance, the budget for courts and justice-related expenditures for 2010 (based on rough estimates) is about \$959,800, about one twentieth of that of the SCSL when it was going full-steam.<sup>196</sup> In that tight national fiscal climate, the common adage that “you get what you pay for” would suggest that the trials in the domestic courts of Sierra Leone would have been substantially different both in terms of the *quantity* and *quality* of justice served.<sup>197</sup> The quantity or number of prosecutions carried out would have been higher, meaning that the cost per individual prosecution would have been much lower. Undoubtedly, on the other hand, the quality of justice rendered would have also suffered. Considering the poor state of the national legal system, except if special improvements were made, a domestic process would have almost certainly failed to adhere to the higher international fair trial standards we rightly demand from the internationally-supported Court.

The challenges faced by national justice systems in prosecuting mass atrocities are not unique to Sierra Leone or Africa. For instance, after studying the Cambodian legal system, a U.N. expert report concluded that “domestic trials organized under Cambodian law are not feasible and should not be supported financially by the United Nations.”<sup>198</sup> In an international environment with widely varying legal systems, it is perhaps futile to compare the costs of international trials against those in

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process many more cases much more quickly. Skilbeck, *supra* note 179, at 8 (noting that the “BiH is able to process several hundred cases per year” in 2006, with pre-trial costs of only \$708,000 each, and anticipating a decrease to \$236,000 per case by 2010).

196. According to the 2010 budget, the Supreme Court, Court of Appeals, and High Court have a combined budget of 1420.3 million Leones (\$361,200 USD). Even when adding the other relevant budgeted amounts for justice related entities: 1,241.8 Le’m budget of the Law Officers’ Department; 149.2 Le’m of the Justice and Legal Service Commission; 962.8 Le’m of the National Commission for Human Rights (subtotal 2353.8 Le’m), the total budget for law enforcement is 3,774.1 Le’m (about \$959,800 USD). GOV’T OF SIERRA LEONE, BUDGET PROFILE, FISCAL YEAR 2008–2010, available at [http://www.mofed.gov.sl/index.php?option=com\\_content&task=view&id=13&Itemid=28](http://www.mofed.gov.sl/index.php?option=com_content&task=view&id=13&Itemid=28).

197. Consider, for instance, the fact that the Government of Sierra Leone is just now launching a national legal aid scheme to provide representation for indigent defendants. On the other hand, it is feasible that international funding to develop a special crimes section within the Sierra Leonean justice system would have provided funding and support for a legal aid system and other key aspects of fair trials. See *The Government of Sierra Leone and JSDP Launch Pilot National Legal Aid for Sierra Leone*, VISITSIERRALEONE.ORG, <http://www.visitsierraleone.org/Sierra-Leone-News/Daily/The-Government-of-Sierra-Leone-and-JSDP-Launch-Pilot-National-Legal-Aid-For-Sierra-Leone.html>.

198. U.N. Group of Experts for Cambodia, Rep., transmitted by letter dated Mar. 15, 1999 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, ¶ 132, U.N. Docs. A/53/850, S/1999/231 (Mar. 16, 1999).

domestic systems.<sup>199</sup> For one thing, though a few states have prosecuted international crimes in their national courts since the end of World War II, the challenge for international justice is immense and unprecedented given the “legal and factual complexities” and the international and novel justice startup contexts in which such trials have been generally held.<sup>200</sup> At this much broader level, if we take arguments comparing the relative value of international courts and national justice systems to their logical conclusion, it would be hard to justify any kind of expenditures for projects like the SCSL. Put differently, there would be no justification for a secondary system of individual accountability for serious crimes at the international level. The culture of impunity for atrocity crimes during the last half-century indicates that conclusion too would be untenable for humanity’s fragile conscience.

Despite the various efforts to distance the SCSL-type model from the budgetary and efficiency problems of Chapter VII courts, the Court faced numerous challenges arising from the mandate it was given and the circumstances surrounding its creation. First, imposing a three year time limitation on the initial mandate created high and unrealistic expectations as to what it could accomplish in the time it had.<sup>201</sup> As some have argued, the only way to limit budgets is to limit the number of cases, a sort of disgruntled response of practitioners constantly badgered for the inefficiency of their cases.<sup>202</sup> Even so, this remains as one of the only viable routes to keep costs down. Thus, faced with limited funding, prosecutors make decisions like they did at the Court, seemingly focusing on maximizing the number of cases that can reasonably be prosecuted given the limited resources and time frame to which they must practically adhere.

Second, the circular logic of the SCSL budget—that it must at once depend on funding to succeed, but it must succeed in order to attract funding—detracted from its efficiency in ways the main organs of the Court could not prevent. In fact, the slow speed of trials in the beginning stages of the SCSL’s work was “largely due to funding issues.”<sup>203</sup> Slower

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199. Skilbeck, *supra* note 179, at 6.

200. Erik Møse & Cécile Aptel, *Trial Without Undue Delay Before the International Criminal Tribunals*, in MAN’S INHUMANITY TO MAN 539, 549–50 (Lal Chand Vohrah et al. eds., 2003).

201. The time limits on hybrid tribunals aim to “avoid the massive costs and delay that plagued the ICTY and ICTR.” Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INT’L L. & POLITICS 1014, 1023–24.

202. Dominic Raab, *Evaluating the ICTY and its Completion Strategy; Efforts to Achieve Accountability for War Crimes and their Tribunals*, 3 J. INT’L CRIM. JUST. 82, 89 (2005).

203. CHATHAM HOUSE, *THE SPECIAL COURT FOR SIERRA LEONE AND HOW IT WILL END* 3 (2007).

trials in the beginning result in longer trials in the end and, ultimately, higher costs.<sup>204</sup> This type of system fails to take advantage of economies of scale arising from the art of learning by doing. By the time the tribunal could have ramped up its prosecutions, it was regrettably expected to start drawing down its operations because of lack of funding and the Security Council imposed completion strategy.

Third, the SCSL, having primacy only over the national courts of Sierra Leone, lacked adequate enforcement or cooperation mechanisms with third party states. Its weak cooperation model, under which countries would voluntarily have to accept requests from the Court, could even be blamed (as argued by Norman's family) for failing to secure state support to the point that it could not offer adequate medical support to those indicted and in its custody.<sup>205</sup> With even the modest mechanisms to ensure state cooperation available to the ICTR/ICTY because of the Security Council's power to take measures to ensure the maintenance of international peace and security under Chapter VII of the U.N. Charter, the Court might have secured the necessary evidence, witnesses, and arrest of the accused much earlier.

In retrospect, it may be that it was wrong for the international community and Sierra Leoneans to herald the SCSL as offering a new brand of justice. It is also now obvious that with its limited judicial mandate, it should not have been expected to serve as the key player in the transitional justice process of a barely functional post-conflict Sierra Leone.<sup>206</sup> Its mere existence did not spring forth a magic potion to wipe out the impunity effects of the wartime atrocities. Yet, many in the international community supported the Court at the expense of the truth commission. The apparent conventional wisdom driving those attitudes was the idea that the former, rather than the latter, held greater prospects for the country's future. Some did not even appreciate that the truth commission was an equally important partner in Sierra Leone's battle against impunity.<sup>207</sup>

At the end of the day, though there is an obvious misalignment between expectations and end results, the actual number of fair trials that the SCSL bequeaths to Sierra Leone will be the concrete indicator by which its achievements will be judged. Indeed, though the Court was

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204. *Id.* at 2 ("If financial shortages do arise, these may result in a delay in proceedings which means that the total costs at the end of the day are higher.").

205. Cockayne, *The Fraying Shoestring*, *supra* note 101, at 636.

206. *See supra* note 2 and accompanying text.

207. For an assessment of the tension in the relationship between the two institutions by a close observer, see William A. Schabas, *Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone*, in *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 157, 179–80 (Cesare P.R. Romano et al. eds., 2004).

perhaps slow in its prosecutions, the very idea of prioritizing speed and efficiency over deliberation and justice carries the inherent prospect that the two imperatives may collide.<sup>208</sup> Yet, as one distinguished international law scholar has suggested, to local war-weary communities, the yardstick of success for such criminal tribunals, or the lack thereof, will often be gauged by “palpable,” tangible factors.<sup>209</sup> High theories of justice as to what can, could, or should have been achieved will likely gain little, if any, traction.

#### D. Limited Support for the Defense Office

The credibility and integrity of the SCSL depends, at least partially, on the accused party's access to fair trial rights.<sup>210</sup> Each of the accused benefited, albeit to different degrees, from Article 17 of the Statute of the Court. That provision guaranteed them, among other rights, the right to be presumed innocent and to a fair and public hearing before an impartial tribunal. It also contained certain minimum guarantees. These include the right to counsel, to adequate time and facilities to prepare the defense, and the right to cross-examine witnesses under the same conditions as witnesses for the prosecution.<sup>211</sup> The language and substance of that provision, borrowed from the International Covenant on Civil and Political Rights,<sup>212</sup> is now a standard part of fair trial clauses in the statutes of all international criminal tribunals.<sup>213</sup>

The problem is that, with the exception of the Special Tribunal for Lebanon, in the SCSL, as in other ad hoc international or internationalized criminal courts, the Statute of the Court failed to specify which organ ought to be primarily responsible for ensuring the protection of the rights of the accused and the defense more generally.<sup>214</sup> In fact, it was

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208. As one commentary on the ICTY points out, the Prosecutor, acting under the completion strategy, faced new challenges: “Conscious of the need to ensure that the ICTY has not omitted investigation of any of the most serious crimes committed—by or against any particular ethnic or religious group—the Completion Strategy has placed a significant additional pressure on the current Prosecutor that her predecessors did not face.” Raab, *supra* note 202, at 90.

209. M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 310 (2010).

210. Wolfgang Schomburg, *The Role of the International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT'L HUM. RTS. 1, 1 (2009).

211. Statute of the Special Court for Sierra Leone, art. 17, Jan. 16, 2002, 2178 U.N.T.S. 145.

212. International Covenant on Civil and Political Rights, arts. 9(3), 14, Mar. 23, 1976, 999 U.N.T.S. 171.

213. Schomburg, *supra* note 210, at 2.

214. Statute of the Special Court for Sierra Leone, art. 17, Jan. 16, 2002, 2178 U.N.T.S. 145 (referring to each of the rights using some variation of the phrase: “[t]he accused shall”

only on the eve of the arrests that the Management Committee and the Plenary of Judges, realizing the limitations inherent in asking the Registrar—an otherwise neutral administrator—to fulfill this protective role, decided to create the Defense Office.

Rule 45 of the Rules of Procedure and Evidence directed the Registrar to “establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused” persons before the Court.<sup>215</sup> Part of the motivation was to ensure that the accused would not be arraigned before the SCSL without some provision for them to be represented by independent counsel.<sup>216</sup> The other imperative was the overarching concern with reducing costs in light of the limited budget and prohibitive legal fees associated with providing legal aid in the ICTY and ICTR.<sup>217</sup>

Rule 45(B) therefore anticipated an office that had mixed functions, which reflected these mixed objectives. The Defense Office was asked to provide, among other things, initial legal advice and assistance through appointed counsel situated within a reasonable proximity of the detention facility; legal assistance as ordered by the Court if the accused does not have sufficient means; and adequate facilities for counsel to use in the preparation of the defense.

The unprecedented and innovative Defense Office was initially conceived of as a semi-autonomous subunit within the Registry. However, in reality, it lacked the necessary autonomy to actually fulfill its immense potential. It was envisaged, at least by some court officials, that the office could eventually become as independent as the Office of the Prosecutor.<sup>218</sup> Still, efforts by Simone Monasebian, the first Principal

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without specifying duties of any organs of the Court to protect these rights); *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, ¶¶ 82, 84 (Dec. 8, 2005), <http://www.sc-sl.org/LinkClick.aspx?fileticket=eeT9jDO%2byAg%3d&tabid=197> (inferring that according to the Statute, no organ carries the responsibility for ensuring the rights of the accused, but rather it must be “a common duty shared by the three organs”).

215. R. P. & EVID., Special Court for Sierra Leone, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=zXPrwoukovM%3d&tabid=176>.

216. Jalloh, *The Contribution of the SCSL*, *supra* note 31, at 180 (“The establishment of the Defence Office in the SCSL was partly motivated by the judges’ concern to preside over fair trials.”).

217. *Id.*

218. PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, *supra* note 48, at 17 (noting the “Registrar’s intention that the Office will, in the future, become as fully independent as the OTP”). The office originated from a proposal by Judge Geoffrey Robertson, the SCSL’s first President. See *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-AR73, Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent

Defender of the SCSL, to convince the parties to make amendments to the instruments of the Court to achieve this conception of an independent office proved futile. These efforts were resuscitated by Vincent Nmehielle, the second Principal Defender, but were also unsuccessful. As the SCSL nears the completion of all its trials, with a Defense Office that is now no more than a shadow of its former self, it seems unlikely that it will accomplish its grand vision of becoming the “fourth pillar” of the Court.<sup>219</sup>

Its dependence on the Registrar also limited its role and hindered its ability to provide adequate facilities for counsel in the preparation of the defense in the AFRC, CDF, and RUF Trials.<sup>220</sup> This outcome was not inevitable. Indeed, by around March 2003, when the first five accused were transferred to the SCSL’s custody, the Defense Office had already begun to carry out its main responsibilities. It offered initial legal advice and representation to the accused, developed a list of counsel, and appointed and contracted generally competent counsel for the various indictees. Even after counsel was assigned, the lawyers in the office continued to assist the defense counsel generally by monitoring the progress of the trials, providing some legal research assistance, and arguing matters of common interest. It also sought to create working relationships with governments and NGOs to address defense concerns.<sup>221</sup>

In advocating the interests of the accused, the Defense Office took responsibility for crucial detention issues that had the potential to impact defendants’ participation in hearings and court processes, and therefore, their fair trial rights. It fell to lawyers in the office to address this lacuna in representation because, due to funding constraints, defense counsel were not paid to deal with detention matters.

The Defense Office also represented defense interests in the plenary meetings of the Court’s judges, wherein rule changes were adopted,

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Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, ¶¶ 88, 102(viii) (Nov. 8, 2005), <http://www.sc-sl.org/LinkClick.aspx?fileticket=cwdREgToCtM%3d&tabid=197>.

219. Prosecutor v. Brima, Kamara & Kanu, Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, ¶ 88.

220. Cassese, *supra* note 2, ¶ 136.

221. Vincent O. Nmehielle, Position Paper on the Independence of the Office of the Principal Defender at Special Court for Sierra Leone 4 [hereinafter Position Paper] (on file with the author) (submitted to the Management Committee of the SCSL by Vincent O. Nmehielle, Principal Defender).

sometimes at the behest of the Prosecutor.<sup>222</sup> Similarly, it played a role in outreach to Sierra Leoneans by helping to educate them about the presumption of innocence and the right to a fair trial. In a country that was still reeling from the trauma and devastating impact of a savage war, this was important given the popular perception that the accused were guilty before they were even tried.<sup>223</sup>

While the foregoing discussion largely reflects the Defense Office's conception of its role, even during its heyday, this assessment was subject to much controversy.<sup>224</sup> The Court and some assigned counsel questioned the usefulness of the office's work, especially as conflicts arose between it and defense lawyers over issues of whether its lawyers could represent accused persons.<sup>225</sup> The office also struggled to keep costs down within the provision of the legal services contract, which was based on a fixed, lump sum system. It made enemies with defense counsel in the process, as it sought to administer a modest budget that was probably among the lowest ever allocated for the cost of legal aid for accused persons in any modern ad hoc international criminal tribunal.

#### *E. Inequality of Arms Between the Prosecution and Defense*

The principle of equality of arms, a now established international criminal law norm, requires that neither the Prosecution nor the Defense suffer such that there is a substantial or material disadvantage in the preparation and presentation of their respective cases vis-à-vis their opponent.<sup>226</sup> As the trials wrapped up in Freetown, insufficient investigative resources, inadequate staffing levels, inadequate funds, and unequal access to other resources such as vehicles and offices "all greatly

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222. *Id.* ("Furthermore, the Defence Office represents works in the interest of the Defence in all other official matters before the Special Court, including issues raised at the plenary sessions organized by the Judges of the Special Court.").

223. Jones et al., *supra* note 167, at 215 ("It is a sad fact that many of the persons detained at the Special Court's facility in Bonthe are 'presumed guilty' by popular opinion. This has to be reversed if they are to receive fair trials.").

224. For a critique that was contested by the Defence Office, see ALISON THOMPSON & MICHELLE STAGGS, UNIV. OF CAL. BERKELEY WAR CRIMES STUDIES CTR., *THE DEFENCE OFFICE AT THE SPECIAL COURT FOR SIERRA LEONE: A CRITICAL PERSPECTIVE* 25 (2007).

225. *Id.* at 40–42 (citing Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Written Reasons for the Decision on Application by Counsel for the Third Accused to Withdraw from the Case (June 19, 2006)).

226. See Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-I-A, Judgment (Reasons), ¶¶ 63–71 (June 1, 2001), [http://www.unictr.org/Portals/0/Case%5CEnglish%5CKayishema\\_F%5Cdecisions%5Cindex.pdf](http://www.unictr.org/Portals/0/Case%5CEnglish%5CKayishema_F%5Cdecisions%5Cindex.pdf); Prosecutor v. Aleksovski, Case No. ICTY-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶¶ 24–25 (Feb. 16, 1999), <http://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm>.

contribute[d] to the quality of the Defense mounted at the Special Court.<sup>227</sup>

With the exception of the Taylor case, which avoided the same fate due to a combination of factors including the courageous gamble of the accused, his provisionally assigned counsel, and the Defense Office, the shoestring budget of the SCSL had the effect of severely limiting the amount of funding available to each of the legal defense teams. As donations to the Court started drying up, budgetary cutbacks left the defense counsel with drastically reduced budgets on the eve of beginning the defense phases of their cases in Freetown. The cutbacks included monies for staffing costs for additional counsel, investigators, legal assistants, and military and other experts.<sup>228</sup>

In general, the facilities allocated to the Defense were also a stark contrast to those provided to the Prosecution.<sup>229</sup> Arguably, of course, it is the latter, rather than the former, that should have more resources because it carries the burden of proving the case beyond a reasonable doubt. While the burden for the defense is only to raise a reasonable doubt, the fact that the two sides work essentially the same case, albeit from different perspectives, suggests that this argument is not as strong as it might initially appear.

At the SCSL, the inequality of resources between the two sides led to tangible differences in terms of access to offices, equipment, and money for local and international investigators and experts to assist the various defense teams.<sup>230</sup> In some cases, defense lawyers were so frustrated that they filed motions seeking orders directing the Registrar and the Defense Office to provide basic facilities like a computer, an extra office, or a vehicle for the defense team.<sup>231</sup> In this fiscally tight environment, lead

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227. THOMPSON & STAGGS, *supra* note 224, at 28. See also HRW, *supra* note 126, at 23.

228. Position Paper, *supra* note 221, at 6.

229. For example:

The Defence Office and its Assigned Counsel as well as the Investigators and interns, occupy one and a half blocks of 7 containers with 14 offices. Inevitably, staff members and also team members share a room, which are not conducive working conditions. On the contrary, the Prosecutor's Office has 4 blocks of 54 containers in total.

*Id.* at 7.

230. HRW, *supra* note 126, at 26.

231. Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Decision on Sesay Defence Application I—Logistical Resources, 4–5 (Jan. 24, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=XuzmFRMpv14%3d&tabid=155> (ordering a second office, furnished with a desk, a second networked computer, a vehicle, and a witness management officer); Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Decision on Defence Application II, ¶ 28 (Feb. 28, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=WfZ3Y3cMpBk%3d&tabid=155> (dismissed in its entirety for the Court's lack of jurisdiction).



international counsel were periodically forced to delegate duties to less experienced legal assistants in Freetown. While some of the case-related issues would have been better dealt with by the lead counsel, they often did not have adequate travel budgets for trips between their home bases (in Europe and North America) and the seat of the Court in Sierra Leone.<sup>232</sup> This sometimes meant that counsel sought the right of audience for Freetown-based legal assistants that, because of their level of experience, the trial judges could not accept.

In short, a major shortcoming of the SCSL derived from the lack of an effective Defense Office with autonomy to make decisions in the interests of justice. Worse yet was the lack of adequate resources for the defense. That, in turn, came about largely because of the Court's shoe-string budget. Indeed, it was widely known that the administrators of the SCSL were at times so cash strapped that they were not sure where the next funds, including basic operating costs such as staff salaries for the next month, would come from.<sup>233</sup> A justice institution with the noblest of goals should not be forced to endure such indignity.<sup>234</sup>

An independent and well-resourced office would have more efficiently and effectively achieved its mandate at the Court. The Registry and Defense Office were basically driven by different imperatives. The former was fixated on keeping costs down. The latter sought to represent only the interests of the accused and justice. As individuals suspected of international crimes are not necessarily the most sympathetic of figures, even among the judges, the defense counsel were dependent solely upon what meager resources the Registry allocated for the Defense Office to disburse to them as contractors.<sup>235</sup>

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232. HRW, *supra* note 126, at 7. See also Position Paper, *supra* note 221, at 5 (noting that the budget is insufficient to meet Defense demands, including for witness support in the field, thus resulting in an impediment to the protection of the rights of the accused).

233. *Officials from UN-Backed Court Appeal for Resources to Finish Sierra Leone Trials*, U.N. DAILY NEWS, July 16, 2009, at 5–6 (quoting Prosecutor Rapp in characterizing the Court's financial situation as "an impending crisis"). See also U.N. SCOR, 62d Sess., 5708th mtg. at 2, U.N. Doc. S/PV.5708 (June 28, 2007) (presenting the Security Council statement urging the international community to support the Court, and noting the ongoing need for financial support).

234. See Dougherty, *supra* note 100, at 326.

235. Position Paper, *supra* note 221, at 8. See also *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, ¶¶ 80–86 (Dec. 8, 2005), <http://www.sc-sl.org/LinkClick.aspx?fileticket=eeT9jDO%2byAg%3d&tabid=197> (mapping out the different, overlapping, and distinct duties of the Defense Office and the Registrar, and the repartition envisioned by Rule 45, and noting that, although assignment of Counsel is a responsibility

In practice, this meant that, from the perspective of the Defense Office, if more resources were needed to mount a proper defense, then that was what the legal aid administrators would recommend to the chief administrator and purser of the tribunal. The Registrar, who would receive such recommendations and decide on them, was by definition conflicted. Why? His goal was to keep costs down to a minimum, and crucially, within the estimated budget that had been contracted for. This was the case irrespective of the specific and often changing or unforeseen requirements of a particular case. It therefore was inherently contradictory that the two bodies, with such divergent interests and views, were lumped together in the first place.

Further, the Office's lack of autonomy implied that when defense lawyers disputed as inadequate the budgetary allocations for the defense before the trial chamber, the office—which was ostensibly created to defend defense rights—would be asked to compromise its position to make arguments in favor of the Registrar who invariably opposed such applications.<sup>236</sup> Yet, on many occasions and sometimes unbeknownst to defense attorneys, the Defense Office would have administratively raised with the Registrar the same complaints regarding the need for more funding for defense teams. Thus, the office would often be caught in between a rock and a hard place: on the one hand, the bosses in the Registry that direct its major decisions, and on the other hand, the privately contracted defense counsel.

Even worse, when the lawyers would take their frustrations to their clients, most of the accused, who had much at stake, understandably sided with their counsel and maligned the office as the enemy in cahoots with the administration to undermine their fair trial rights. By the beginning of the defense phase of the trials, the office was trapped in a vicious lose-lose spiral without any tangible prospects of breaking out of it.

Although dispensing justice and ending impunity in Sierra Leone were undoubtedly laudable goals, the SCSL was, in practice, so constrained by the general lack of funding<sup>237</sup> that its treatment of the accused and defense rights gave the unfortunate impression of being setup with

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solely in the province of the Defense Office, “the Registrar did not divest himself of his power” to act in such matters and “can therefore act concurrently with the Principal Defender”).

236. See *supra* note 231 and accompanying text. See also *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Decision on Sesay Defence Application I—Logistical Resources, 3 (noting the response application by the Registrar); *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Decision on Defence Application II, ¶¶ 10–13 (describing the joint reply by the Defense Office and the Registry).

237. See Dougherty, *supra* note 100, at 324 (quoting an interview with Registrar Robert Vincent in which he lamented, “the SCSL is not lean and mean, it is anorexic”).

the sole purpose to convict.<sup>238</sup> Yet, conviction was not the only goal of President Kabbah or the Security Council—both of whom wanted *credible justice* dispensed in accordance with the highest fair trial requirements of international human rights law.

As a result, this experience will undermine the perception of the Court's positive legacy in Sierra Leone. It may not necessarily be seen as a model of fairness for the ailing national justice system.<sup>239</sup> Indeed, if a positive lesson can be gleaned from the treatment of the defense, it is the reality that, based on the Sierra Leonean experience, the Security Council established a fully autonomous defense office in the recently established Lebanon Tribunal—the first of its kind in the history of international criminal law.<sup>240</sup>

#### IV. DID THE SPECIAL COURT FOR SIERRA LEONE BRING JUSTICE, PEACE, AND RECONCILIATION TO SIERRA LEONE?

Having examined its intended role at its creation, as well as the background to its cases and some of its key limitations, the only remaining task of this Article is to assess the positive impact, achievements, and contributions of the Court to the challenge of achieving justice through prosecutions and the targeting of the culture of impunity in Sierra Leone. In this regard, the first question that arises is whether the SCSL has prosecuted those leaders deemed to bear the greatest responsibility for the grave crimes perpetrated in Sierra Leone during the latter half of the 1990s, consistent with the primary objective of the GoSL and the Security Council. If so, the next question is whether those trials were

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238. See Wayne Jordash & Scott Martin, *Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone*, 23 LEIDEN J. INT'L L. 585, 587, 608 (2010) (noting that there are aspects of the trial just as important as "the final tally of convictions" and critiquing how the types of "demonstrably unsafe convictions may well satisfy those focused only on the immediate policy objectives defined by the need to bring accountability to war-torn countries"). Romano provides a report of major international law institutions. His diagnosis of the SCSL includes firstly that the Court demonstrated that voluntary contributions are neither sustainable nor feasible. Secondly, he affirms and restates the Secretary-General's initial concern in setting up a court based on this funding system. That is, "without long-term assurances of the continuous availability of funds, risks in terms of moral responsibility, loss of credibility of the UN and exposure to legal liability, are very high." Romano, *supra* note 168, at 298.

239. Analogous arguments have been made against shoestring budgets of other international criminal institutions. With regard to the East Timor and Kosovo Tribunals, for instance, Romano argues that the obsession with cheaper trials has led to the shortsighted and frail conception that "a little prosecution is better than nothing." Romano, *supra* note 168, at 301. This is especially weak logic, as he points out, on which to "rebuild the judiciary of those war-torn regions." *Id.* at 302.

240. Jalloh, *The Contribution of the SCSL*, *supra* note 31, at 180.

conducted in accordance with international standards of justice, fairness, and due process of law.

### A. Justice and Overall Fairness of the Trials

In response to the first of these two issues, at a general level, it seems clear that the SCSL has achieved some of its core mandate. That is, it has brought members of the RUF leadership and some of their collaborators (the AFRC) to justice through independent prosecutions. The Court convicted six military leaders who were personally found to have committed, or gave orders for others to commit, crimes against humanity, war crimes, and serious violations of international humanitarian law in Sierra Leone after November 30, 1996. Included are convictions for controversial charges of novel gender crimes in the form of “forced marriage.”<sup>241</sup> Similarly, the SCSL also successfully prosecuted crimes in connection with child recruitment as a violation of customary international law as well as in respect of rebel attacks on U.N. peacekeepers. Both were firsts in the history of international criminal law.<sup>242</sup>

Recall that President Kabbah’s principal objective in requesting international support for the Court was to ensure that the RUF leadership and their accomplices were brought to justice.<sup>243</sup> Clearly, though not every leader of that rebel organization was prosecuted, at least some of the mid to high level leaders have been. The SCSL may have also exceeded expectations in prosecuting additional offenders, in particular the two CDF leaders (Fofana and Kondewa) though, as I argued earlier, this also proved to be a controversial decision—at least within Sierra Leone. In short, many observers who have followed the work of the Court from its earliest days to these twilight days may not begrudge it this generally positive assessment of its disposition of those cases.

Similarly, with respect to the second question (which relates to the overall fairness of trial proceedings), many commentators would probably agree that, overall, the SCSL also succeeded in holding fair trials that

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241. For further commentary, see Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a “New” Crime Against Humanity*, 2 J. INT’L CRIM. JUST. 1033–42 (2004) (noting that the Special Court for Sierra Leone recognized that forced marriage may amount to a crime against humanity as an “other inhumane act”); Valerie Oosterveld, *The Special Court for Sierra Leone, Child Recruitment and Forced Marriage: Providing Clarity or Confusion?*, 45 CAN. Y.B. INT’L L. 131, 168–71 (2007).

242. For a prosecution perspective on prosecuting the crime of attacking U.N. peacekeepers, see Mohamed A. Bangura, *Prosecuting the Crime of Attack on Peacekeepers: A Prosecutor’s Challenge*, 23 LEIDEN J. INT’L L. 165, 174 (2010).

243. Kabbah Letter to UNSC, *supra* note 3, at 2.

were generally consistent with international standards of justice, fairness, and due process of law.<sup>244</sup>

This is not to suggest that the Court is above criticism in various areas.<sup>245</sup> For instance, as shown in Part III, numerous complaints can be made regarding the SCSL's treatment of the rights of the accused and the limited institutional support and funding provided to the defense during the Freetown trials. Though important in addressing the disproportionately gendered burden of the war on Sierra Leonean women, from a defense perspective, the successful convictions discussed above left serious concerns about the level of commitment to the principle of non-retroactive application of law and the right of the accused to a fair trial as specified in the statute and international human rights law.

### B. Failed Expectations of Efficient and Expeditious Trials

The SCSL was specifically designed to improve on the trial efficiency of the ICTR and ICTY.<sup>246</sup> At its creation, it was widely hailed as a model or benchmark for the assessment of future ad hoc international criminal courts.<sup>247</sup> Against this backdrop, we should inquire whether the Court has fulfilled some of those high expectations. In other words, did it conduct its limited trials in a manner that is not only more efficient but also relatively less costly in comparison with other ad hoc international penal tribunals?

According to the American founding Prosecutor of the SCSL, David Crane, who oversaw the early investigations and prepared all of the Court's indictments:

We have shown the world that international criminal justice can be done within budget, within a specific time frame and be very effective in targeting those who they are mandated to prosecute

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244. Consider, for instance, the Court's commitment to impartial proceedings as exemplified by the decision of the majority of the Appeals Chamber to disqualify an influential sitting judge. See *Prosecutor v. Sesay*, Case No. SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Mar. 13, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=uabm35Hc0jg%3d&tabid=195>. For commentary, see James Cockayne, *Special Court for Sierra Leone Decisions on the Recusal of Judges Robertson and Winter*, 2 J. INT'L CRIM. JUST. 1154, 1161-62 (2004) (suggesting that the dismissal of judges actually has negative implications for impartiality). *Contra* Jordash & Martin, *supra* note 238, at 607-08.

245. Cassese, *supra* note 2, ¶¶ 16, 35 (assessing and criticizing the judicial output and lack of productivity at the Court). See also *The Price of Healing*, ALL AFR., Aug. 4, 2006, <http://www.ictj.org/en/news/coverage/article/990.html>; Penfold, *supra* note 131 (criticizing the expense of justice at the SCSL).

246. Cassese, *supra* note 2, ¶ 2.

247. See *supra* note 2 and accompanying text.

... the Special Court in Sierra Leone is showing that international criminal justice can be done efficiently and effectively.<sup>248</sup>

Though the Prosecution ultimately succeeded in achieving a guilty verdict for each of the individuals that it charged and tried in Freetown, as will be discussed next, the claim that the Court's trials were conducted with expediency and efficiency is highly debatable.

Following a study of the SCSL commissioned by U.N. Secretary-General Annan, former ICTY President Antonio Cassese wrote an independent expert report confirming as much.<sup>249</sup> He found that, in addition to the general insecurity arising from the voluntary funding system, the SCSL suffered from a lack of strong judicial leadership.<sup>250</sup> It also reinvented the wheel by failing to draw lessons from the available experience in conducting criminal proceedings in other international criminal tribunals.<sup>251</sup> In his assessment, even if the Court were to have completed all of its three (now four) trials between mid-2002 and the end of 2009 (which did not occur because, as noted earlier, the Taylor Case still continues), the overall level of efficiency of the SCSL trials "is not a significant improvement on the record of the ICTR or ICTY, which within a comparable time frame tried many more accused, albeit with more [j]udges, staff, and resources."<sup>252</sup> This language implies that Judge Cassese considered this record to be *somewhat* of an improvement over existing ad hoc tribunals, even if it fell short of widespread expectations.

Nevertheless, the Court *could* and *should* have done a better job with the pace of its trials. This is particularly so given the roughly \$212

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248. Cobb, *supra* note 124. See also Crane, *Dancing with the Devil*, *supra* note 144, at 2 (noting that the SCSL showed that international criminal law could be efficient); Crane, *Terrorists, Warlords, and Thugs*, *supra* note 48, at 516 ("International criminal justice can be effectively and efficiently delivered within a politically acceptable time frame. . . . [T]he Special Court for Sierra Leone . . . has shown that it can be done."). But see David Crane, *Justice for Freetown: The Sierra Leone War Crimes Verdicts*, JURIST, June 25, 2007, <http://jurist.law.pitt.edu/forumy/2007/06/justice-for-freetown-sierra-leone-war.php> ("Justice is never perfect, efficient, nor at times swift; but it surely can bring hope, some reconciliation for victims, and the possibility of a sustainable peace.").

249. Cassese, *supra* note 2, ¶¶ 6, 14 ("[The Independent Expert] shall scrutinize the operation and functioning of the Court 'with the objective of ensuring the most efficient use of the Court's resources and the completion of the Court's work in a timely manner while at the same time maintaining the highest standards of fairness, due process and respect for human rights' . . . conducting 'an assessment of judicial output and productivity, the efficient use of courtroom space and resources and factors influencing the duration of judicial proceedings.'").

250. *Id.* ¶ 6.

251. *Id.* ¶ 54.

252. *Id.* ¶ 5.

million that it has reportedly expended so far.<sup>253</sup> While this amount pales in comparison to the much higher (billion dollar plus) expenditures of the ICTY and ICTR, it takes on new meaning in the Sierra Leonean context.<sup>254</sup> Imagine an alternative possibility that the Kabbah Government appeared to initially float, whereby the tribunal's trials would have been held in a special crimes chamber of the national court system of Sierra Leone.<sup>255</sup> Planned and implemented well, such a hybrid system might have led to greater success vis-à-vis the current SCSL model.

This alternative is admittedly fraught with difficulty, as the East Timor and Kosovo hybrid courts suggest. The U.N. Transitional Administration in East Timor established the Special Panels for Serious Crimes within the new domestic justice system following that country's independence from Indonesia.<sup>256</sup> Though solely a U.N.-run operation, the trials were marred with difficulty and achieved limited success because

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253. Craig Timberg, *Sierra Leone Special Court's Narrow Focus: Well-Funded But Selective War Crimes Probe Draws Resentment of Impoverished Victims*, WASH. POST, Mar. 26, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/25/AR2008032503156.html> ("By the time the court finishes its work in 2010, the total cost is projected to reach \$212 million—a massive sum for a country that the United Nations ranks as the least developed in the world."). My calculations lead to an estimate of \$222.9 million for the SCSL, calculated based on the expenditures of the SCSL as provided in the First through Fourth Annual Reports covering July 2002 through December 2006. PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, *supra* note 48, at 36 (reporting actual expenditures from July 2002–June 2003); PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, SECOND ANNUAL REP. OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 41 (2005) (reporting actual expenditures from July 2003–June 2004); PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, THIRD ANNUAL REP. OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 46 (2006) (reporting actual expenditures from July 2004–June 2005); PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, FOURTH ANNUAL REP. OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 63 (2007) (reporting actual expenditures from July 2005–December 2006). Because the Fifth and Sixth Annual Reports did not include actual expenditures, I instead used the total contributions for 2007 and 2008 in place of expenditures. PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, FIFTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 61 (2008) (reporting on contributions made from January–December 2007); PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, SIXTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 66 (2009) (reporting on contributions made from January–December 2008). As the Seventh Annual Report does not provide actual expenditures or contributions, I used the approved budgets for 2009 and 2010. PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE, SEVENTH ANNUAL REP. OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 38 (2010) (reporting the approved organizational costs for January 2009–December 2010).

254. See discussion *supra* Part III.C. (describing the significance of a shoestring budget in the context of the SCSL).

255. See Kabbah Letter to UNSC, *supra* note 3, at 3–5.

256. See Sylvia de Bertodano, *East Timor: Trials and Tribulations*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 207, at 79, 96; Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 206–07 (2001).

of poor management, lack of funding, experienced personnel, and political will.<sup>257</sup>

Similarly, the Kosovo War and Ethnic Crimes Court was created by the U.N. Interim Administration Mission in Kosovo.<sup>258</sup> It was felt that incorporating international prosecutors and judges into the existing system would improve the chances of impartiality in rendering justice while bringing to bear international skills and knowledge for the benefit of the local justice system. The experiment largely failed because of poor design and a lack of funds and capacity to implement it successfully.<sup>259</sup>

Still, in the Sierra Leonean situation, a carefully designed hybrid could have helped the founders of the SCSL better achieve their stated secondary objective of helping to rebuild the rule of law and the battered national justice system while generally keeping costs down.<sup>260</sup> In turn, this would have likely resulted in other worthy benefits like improving the country's judicial capacity, as well as its legislative and human resources to prosecute both domestic and international crimes.<sup>261</sup>

It is easy to take the moral high ground and to argue that justice cannot, and should not, be measured in dollars and cents.<sup>262</sup> Indeed, many say just that.<sup>263</sup> And that may be true at a conceptual level. But, in a world where every dollar and every cent must be fairly accounted for by the Court to its donors and the populace for whose benefit it was primarily established, the cost of approximately \$23 million per trial is perhaps too high. Context also matters. The entire justice sector in Sierra Leone operates on less than \$1 million each year,<sup>264</sup> a fraction of the estimated

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257. See Bertodano, *supra* note 256, at 96; Linton, *supra* note 256, at 206–07.

258. John Cerone & Clive Baldwin, *Explaining and Evaluating the UNMIK Court System*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 207, at 41.

259. Jean-Christian Cady & Nicholas Booth, *International Courts in Kosovo: An UNMIK Perspective*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 207, at 59, 60.

260. S.C. Res. 1315, *supra* note 14, pmbl. ¶ 9 (stating the objectives of the Court).

261. See William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 760 (2003) (noting that regional enforcement mechanisms generally may “have greater legitimacy within affected communities”).

262. See, e.g., Bassiouni, *supra* note 209, at 317 (“From both an ethical and moral perspective, there is no price tag for doing what is right.”).

263. David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861, 863 (2006) (quoting the famous judge of the Oklahoma City bombing case: “We don’t use a cost-benefit analysis in deciding what’s necessary for a fair trial”); Interview by Angela Stavrianou with Joseph Kamara, Former Acting Prosecutor for the Special Court for Sierra Leone, in the Hague, Neth. (Mar. 10, 2010) [hereinafter Joseph Kamara Interview] (“You cannot put a price on peace, and you cannot put a price on justice.”).

264. *Supra* note 196 and accompanying text.



cost of a single trial prosecuted before the Court. Assuming costs remained stable, this would work out to about twenty-three years worth of expenditures, including all criminal trials and other justice-related expenses in the national system. Thus, it is not surprising to hear that many Sierra Leoneans consider the overall cost of the SCSL too high a price to pay for what they received in return.<sup>265</sup>

On these facts, it would seem hard to convince the people of Sierra Leone that the Court was a good value for the money. Yet further qualifications must be added. For instance, it appears that many people in the country misapprehend the situation and incorrectly conduct a cost-benefit analysis between the SCSL and the provision of desperately needed facilities like roads and schools. While the involvement of the United Nations in creating the Court undoubtedly generated high and unrealistic expectations for what might be accomplished, this comparison may be a false one for two reasons.

First, the SCSL is not a failed development project. Rather, it is an independent justice project in its own right. It has its own inherent value, albeit hard to translate into actual dollars and cents. What is more, the Court did enjoy—at least initially—popular support among war-weary locals. In fact, it is common knowledge that Sierra Leonean civil society played an important role in advocating for the establishment of a criminal tribunal to prosecute the crimes that occurred during the war. At the time that the government granted all combatants amnesty in return for peace in July 1999, human rights groups were the loudest groups opposing the idea. It was against such a backdrop that the democratically elected Kabbah Government requested international community support for a special tribunal in the name of the people of Sierra Leone.

Second, and perhaps more importantly, nothing was foregone when the SCSL was established. There is no global or U.N. fund that was tapped for money to fund the Court. Rather, the SCSL raised every dollar, dime, and cent that it has spent. Moreover, it is an open secret that it has had difficulty raising funds for its most basic operating expenses. For this reason, among others, it would appear *highly unlikely* that, even without the creation of the tribunal, the money that was spent on the Court would have ended up in the impoverished country to fund devel-

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265. See Umaru Fofana, *Did Sierra Leone Get War Crimes Justice?*, BBC NEWS (Nov. 6, 2009), <http://news.bbc.co.uk/2/hi/africa/8345618.stm> (“[F]or the scarred victims of the war struggling to feed or educate their children, the many millions of dollars that has been spent on bringing about that justice could have been better spent. . . . But for Binta Mansaray, the court’s Sierra Leonean-born acting registrar, the money was worth it. She says the money spent on the court does not come anywhere near the lives and resources that would have been wasted if the war had continued.”).

opment projects or other things deemed more desirable by Sierra Leoneans. In any event, it may be that for the survivors of mass atrocities, the struggle to eke out a living today appears to simply outweigh the (fading) Kantian imperative of receiving justice for what happened yesterday. Perhaps this is inevitable in an impoverished country like Sierra Leone, which has been repeatedly ranked as the poorest in the world.<sup>266</sup>

Judge Cassese's overall assessment of the slowness of SCSL trials is significant not only from the perspective of efficiency and cost, but also given the right of all accused persons to a trial without undue delay, as specified in Article 17(4)(c) of the Court's Statute. The length of time demanded for such complex trials might interfere with the rights of the accused who are incarcerated without any bail during the proceedings. Excessively lengthy pre-trial detention may also violate the presumption of innocence, to which everyone is entitled, especially those accused of serious international crimes.<sup>267</sup>

### *C. Lasting Peace and the Deterrence Value of the SCSL*

One of the added values of international criminal tribunals is that they appear to help create the political and legal conditions under which dangerous individuals can be legitimately removed or isolated from society. Not only is the incarcerated person unable to commit more crimes while detained (specific deterrence), incarceration also helps to discourage others from committing similar crimes (general deterrence). Often, the procedural guarantees of due process serve to confer legitimacy on the decision to remove the person from society, thereby depoliticizing the decision, at least to some extent.

It will be recalled that the founders of the SCSL felt that, in the particular circumstances of Sierra Leone, the prosecution of those responsible for serious atrocities would contribute to the restoration of *lasting peace*.<sup>268</sup> It is difficult to establish whether the criminal law actually deters potential criminals from committing crimes. However, there is some evidence of that effect in so far as it relates to the achievement of

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266. *Human Development Report 2009: Sierra Leone*, U.N. DEV. PROGRAM, [http://hdrstats.undp.org/en/countries/country\\_fact\\_sheets/cty\\_fs\\_SLE.html](http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_SLE.html). Sierra Leone has consistently ranked as one of the least developed countries in the world according to the U.N. Human Development Index. For instance in 2009, it was ranked 180 out of 182 countries (2009); 177 (2007/2008); 176 (2006); 176 (2005); 176 (2004); 175 (2003); 173 (2002). *Id.*

267. Cassese, *supra* note 2, ¶ 67 (noting that the extensive length of proceedings undermines both the credibility of the Court and its ability to provide defendants with their right to an expeditious trial. "Excessive deprivation of liberty of persons who are presumed innocent, although accused of the most atrocious crimes, is intolerable.").

268. S.C. Res. 1315, *supra* note 14.

what may be better termed short-term *peace* in Sierra Leone. The “embers of war” were still burning in Freetown as the Court was being discussed and the arrangements for its creation were being made.<sup>269</sup> On January 18, 2002, only two days after the legal representatives of the parties signed the treaty creating the SCSL, President Kabbah officially declared the war over.<sup>270</sup>

It stands to reason that some former rebel leaders and combatants may have been dissuaded from engaging in further violence because of the anticipated presence of the Court. Indeed, President Kabbah suggested, as far back as June 2000, that merely beginning the process of creating a special tribunal would “at once send the right signals to the perpetrators of the violations that they will not continue committing atrocities with impunity.”<sup>271</sup> The reality is that the perpetrators did not seem to engage in further violence once serious plans got underway to create a penal tribunal. Thus, the SCSL functioned, at least in part, to dissuade further violence and in that way helped to restore peace. This has been confirmed by a recent survey of national perceptions about the contribution of the Court to peace in Sierra Leone.<sup>272</sup>

That the SCSL took certain influential military and political leaders out of circulation was thus highly significant.<sup>273</sup> By arresting and incarcerating them, the Court minimized the potential for further hostilities.<sup>274</sup> This incapacitation role is all the more important given that the decision to lay down arms was not always supported by some of the combatants and their leaders.

This is particularly important given that, in the immediate aftermath of the war, the list of perpetrators effectively constituted an entire army of 30,000—if one accepts the rather exaggerated number offered by the Prosecutor.<sup>275</sup> In any case, by the end of 2002, thousands of RUF com-

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269. Nmehielle & Jalloh, *Legacy of the SCSL*, *supra* note 33, at 109, 121 (noting the Court’s recognition that ongoing trials proceeded amidst the war and how this context poses a great challenge to the legacy of the SCSL).

270. His Excellency, Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, Speech at the Ceremony Marking the Conclusion of Disarmament and the Destruction of Weapons (Jan. 18, 2002). See <http://www.sierra-leone.org/Speeches/kabbah-011802.html>.

271. Kabbah Letter to UNSC, *supra* note 3, at 4.

272. MEMUNATU BABY PRATT, NATION-WIDE SURVEY ON PUBLIC PERCEPTIONS OF THE SPECIAL COURT FOR SIERRA LEONE 8–9 (2007).

273. Joseph Kamara Interview, *supra* note 263 (describing what the SCSL has done for peace. The former acting chief prosecutor explained that, without the Special Court, the rebel groups “would be free to walk the streets of the country’s cities and towns with impunity.”).

274. *Id.* (noting that, without having been arrested, Charles Taylor would have been “free to plan as he wished”).

275. Crane, *Terrorists, Warlords, and Thugs*, *supra* note 48, at 512.

batants, many of whom were child soldiers, had been disarmed and demobilized.<sup>276</sup> Hundreds of thousands of internally displaced persons as well as Sierra Leonean refugees scattered throughout West Africa returned home.<sup>277</sup> Indeed, the former Sierra Leonean Minister of Justice (Serry Kamal, former defense counsel at the Court) claimed that the 2007 national elections proceeded smoothly in large part because of the presence of the SCSL in the country.<sup>278</sup> The significance of this cannot be underestimated as it marked the first time since 1967 that power was peacefully transferred to an opposition party in Sierra Leone.

Though not yet proven empirically, it seems safe to conclude that the Court played a tremendously important role by helping break down the remaining will to fight among the unwilling rebels who wanted to continue the war. It probably also contributed by effectively destroying, or catalyzing the destruction of, the residual command structure of the RUF and the AFRC—both of which proved to be criminal organizations that carried out mass atrocities against innocent civilians during the infamous Sierra Leonean conflict.<sup>279</sup>

#### D. National Reconciliation?

On the question of whether the SCSL may be said to have contributed to *national reconciliation* in Sierra Leone, as the Kabbah Government and the Security Council hoped,<sup>280</sup> the jury is still out. With

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276. U.N. Secretary-General, *Sixteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶¶ 28, 31, U.N. Doc. S/2002/1417 (Dec. 24, 2002) [hereinafter U.N. Secretary-General, *Sixteenth Report*] (discussing the demobilization plan, particularly the 5,037 to 6,845 child combatants registered to receive support, and noting the shift from “peacekeeping to peace building and from relief to development”). See U.N. Secretary-General, *Seventeenth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶¶ 30, 42–43, U.N. Doc. S/2003/321 (Mar. 17, 2003) [hereinafter U.N. Secretary-General, *Sixteenth Report*] (discussing concern for the reintegration of child soldiers and ex-combatants). See generally CAROL BELLAMY, UNICEF, *THE STATE OF THE WORLD’S CHILDREN: CHILDHOOD UNDER THREAT* (2005); CAROL BELLAMY, UNICEF, *THE STATE OF THE WORLD’S CHILDREN 2002: LEADERSHIP* (2002).

277. For more discussion of the reintegration of ex-combatants, see U.N. Secretary-General, *Sixteenth Report*, *supra* note 276, ¶¶ 19–21; U.N. Secretary-General, *Seventeenth Report*, *supra* note 276, ¶¶ 30–32.

278. SIGALL HOROVITZ, *THE DOMAC PROJECT, SIERRA LEONE: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL RESPONSES TO THE MASS ATROCITIES 47* (2009), available at <http://www.domac.is/media/domac/DOMAC3-SH-corr.pdf> [hereinafter DOMAC REPORT].

279. See *Prosecutor v. Sesay Appeals Judgment*, Case No. SCSL-04-15-A, ¶¶ 13–19 (Oct. 26, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=CGgVJRfNF7M%3d&tabid=218>; *Prosecutor v. Brima Appeals Judgment*, Case No. SCSL-04-16-A, ¶¶ 20–21 (Feb. 22, 2008), <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx>.

280. S.C. Res. 1315, *supra* note 14, pmb. ¶ 7.

just nine years having elapsed since the official end of the war, it may well be too early to tell. What is clear is that, from the beginning, perceptions of the Court have been marred by political divisions amongst Sierra Leoneans.<sup>281</sup> Existing divides between the northern and southern parts of the country may also have been reinforced by the inherently adversarial nature of criminal trials. Furthermore, the limited temporal jurisdiction of the SCSL (covering only the latter half of the war) meant that certain prosecutions could only take place with respect to certain crime bases in major centers like the capital, Freetown. This was to the detriment of earlier incidents in the rural parts of Sierra Leone.<sup>282</sup> This appeared to reignite age-old rural versus urban rivalries (Freetown vs. “up country”) that go as far back as the colonial period in Sierra Leone.<sup>283</sup>

On the other hand, other Sierra Leoneans may argue that the Court brought much needed value. In particular, locating the SCSL in Freetown proved to have enormous benefits. As the first modern ad hoc international tribunal to be located *in situ*—the place where the atrocities occurred—it not only offered victims, witnesses, and the general populace better access to justice,<sup>284</sup> but also created the potential for them to contribute more visibly, more cheaply, and more efficiently to the proceedings before the Court.<sup>285</sup> For example, most of the prosecution and defense witnesses came from Sierra Leone and therefore did not need to travel outside the country to testify.

The placement of the SCSL in the country also clearly impacted the extent of media coverage and public interest and engagement with the trials.<sup>286</sup> So although it has sometimes being criticized for being

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281. DOMAC REPORT, *supra* note 278, at 45–47 (discussing negative perceptions of the Court as a foreign entity and noting the local fear that the trials will increase tensions between the RUF and CDF supporters, and thus, contribute to destabilization).

282. For more on the general skepticism of rural Sierra Leoneans, see Penfold, *supra* note 131 (arguing that many persons in rural areas see the SCSL trials as divisive).

283. There is an age old division between the urban and rural inhabitants of Freetown, Sierra Leone’s capital city and relatively most developed area of the country, and rural areas outside of it. This goes back to the colonial period during which the country, like other British colonies, was divided into the Protectorate and the Hinterland. Not surprisingly, some people from Freetown describe everything outside of the city as “up-country,” a term that is deemed to be derogatory as it implies a sense of backwardness associated with the rural areas.

284. Joseph Kamara Interview, *supra* note 263 (noting public opinion surveys that “show that the majority of Sierra Leoneans strongly support” the Court and “believe it has made a difference to their lives and to the country”).

285. Cf. Bassiouni, *supra* note 209, at 309–10 (commenting that locating the Chapter VII tribunals in the country of the conflicts would have lessened costs, promoted a local sense of justice, and employed more locals).

286. Cf. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 44, U.N. Doc. S/2004/616 (Aug. 23, 2004) (describing how

inaccessible with its high barbed wire gates and tight military camp style security,<sup>287</sup> the Court contrasts favorably with the experiences of the ICTY, which sits in The Hague, Netherlands, and ICTR, in Arusha, Tanzania. Both of the latter are located a considerable distance away from the populations in whose names they are rendering justice.

Conversely, it could be argued that the goal of bringing “justice closer to the people” might also have stoked fears about potential destabilization of the country and the region.<sup>288</sup> A case in point is that the governments in Liberia and Sierra Leone, as well as the leadership of the SCSL, each requested that the Taylor proceedings—the highest profile case before the Court—be moved away from the headquarters in Freetown to The Hague, a distant European venue. Security concerns arguably made that a better option than holding the trial in Freetown. This was most unfortunate given the common knowledge that many Sierra Leoneans wished to have closer access to the trial.

Similarly, but more troubling from a security point of view, was Norman’s arrest. Not only did the former Sierra Leonean Deputy Minister’s popularity and desire to stay in the public spotlight play into latent political and ethnic cleavages within the country, the reality was that former CDF combatant supporters, from whence came his support base, mostly resided within the confines of Sierra Leone. This raised the specter of further insecurity arising from the SCSL’s location within the country. The Court is reported to have even taken special security measures to address a threat of a possible attack by former Norman supporters.<sup>289</sup> The SCSL’s decision to ban contact between Norman and the outside world—with the exception of his defense attorney<sup>290</sup>—further politicized its work in the eyes of many. It exposed the intense political cleavages in Sierra Leone. Those, in turn, undermined the prospects for real national reconciliation; at least in the short to medium term.

Even worse was the tension that arose between the Court and the national truth commission toward the end of the latter’s mandate. Among other things, its refusal to allow Norman to testify before the truth commission resulted in political fallout and a loss of legitimacy in the eyes of

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locally established tribunals can improve interaction with the local population and the accessibility of the proceedings).

287. Timberg, *supra* note 253.

288. Mark A. Drumbl, *Charles Taylor and the Special Court for Sierra Leone*, ASIL INSIGHTS, Apr. 12, 2006, <http://www.asil.org/insights060412.cfm>.

289. Evenson, *supra* note 151, at 743 (describing Norman’s isolation from outside communication for fourteen days after it was discovered he was prepared to incite civil unrest amongst his supporters).

290. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision Prohibiting Communications and Visits (Jan. 20, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=ZjDCrS1YcHE%3d&tabid=153>.

the public. Indeed, it is anecdotally reported that even the manner in which the SCSL handled the request for him to testify was seen as disrespectful and perhaps even arrogant. In the end, by gagging Norman, many people were left with the impression that the Court put its own interests first and cared little for the impact of its decision on the more important process of national reconciliation.

Overall, while the SCSL ought to be lauded for the significant and important contributions to the post-conflict dispensation of justice in Sierra Leone, the Court's actual and insensitive trials of leaders from the CDF group had the opposite effect of what its founders may have expected. It thus appears fair to conclude that it contributed more to the process of national separation than national reconciliation.

### CONCLUSION

Like beauty, the question of whether the SCSL is achieving justice is in the eye of the beholder. Because Sierra Leone's justice system was and, still is, so dysfunctional, it cannot serve as a meaningful comparison to the Court.<sup>291</sup> Rather, as an international court, the SCSL should be held to the higher, if still ideal, international standard.<sup>292</sup> Indeed, if one were to judge how well the Court treated the accused and the defense by the standards of the Sierra Leone criminal justice system, it would probably be deemed exemplary, if not perfect in all relevant respects.

Everything was done better: respecting the rights of the accused upon arrest, advising them of charges, affording them the right to generally competent counsel, funding to have a defense to challenge the Prosecution's case, and providing humane conditions under which accused persons and convicts were held. While denied their liberty, they were guaranteed three square meals a day, exercise facilities, satellite television, a library, and access to their families. As detainees, they were virtually guaranteed freedom from gross indignities such as arbitrary use of force or torture while in detention—all of which are not unheard of in

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291. See Knowles, *supra* note 121, at 392. But see Karol Boudreaux, *The Business of Reconciliation: Entrepreneurship and Commercial Activity in Post-Conflict Rwanda*, ECON. AFF., June 2007, at 6, 12 (arguing in favor of *Gacaca* courts as opposed to the ICTR). Consider also that the use of the death penalty, symbolic in many ways for its lack of protection of the accused, persists, or did at the time of the related court's creation, in many of the countries which have international criminal tribunals.

292. See Schomburg, *supra* note 210, at 2 ("[T]he Secretary-General of the UN emphasized the following: 'It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.'").

national prisons.<sup>293</sup> In fact, it is only because of the SCSL that the convicts were spared the ultimate punishment of death, which still applies in Sierra Leone.

For this reason, many Sierra Leoneans would probably not sympathize with any complaints from those that were eventually prosecuted by the Court. It seems that instead of helping the victims rebuild their shattered lives, they perceive that the international community's focus, for the little time it lasted, was wasted on punishing a few perpetrators of the war.<sup>294</sup> For some, it would be a paradox that a handful of people found guilty for some of the worst crimes ever committed live far better lives than the majority of the local population, including war survivors and amputees, could ever dream of having.<sup>295</sup>

In sum, this Article has argued that there is a variety of ways in which the SCSL is achieving justice in Sierra Leone. First, I suggested that the Court has ensured that punishment is meted out to *some* of those deemed to bear the greatest responsibility for the serious atrocities committed in Sierra Leone. This is no mean feat since a fragile peace and the specter of further war hung over the country, even as the SCSL was being negotiated and built in the heart of a mostly dilapidated Freetown.

But this generally positive assessment must be counterbalanced against the reality that many other alleged middle to high level perpetrators of mass crimes have not faced, and are unlikely to ever face, any prosecution.<sup>296</sup> I uncovered two explanations for this: (1) the deliberately limited jurisdiction which was driven by the international community's desire to cut costs and, (2) the extremely conservative interpretation that the Prosecutor gave to the Court's personal jurisdiction to try those bearing greatest responsibility for what happened in Sierra Leone. In many ways, we have seen that the Prosecution was apparently worried about the political acceptability of his legal decisions and that this, in turn, made him comfortable pursuing only a limited set of cases. That dashed local expectations, confirming the early fears of U.N. Secretary-General Kofi Annan during the negotiations for the establishment of the Court.

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293. Knowles, *supra* note 121, at 414–15 (describing how the Defense Office and others helped to preserve the rights of the accused).

294. The Court expected to prosecute less than thirty-five people, and only actually indicted thirteen. See *supra* notes 129–135 and accompanying text.

295. For a similar argument, see also Penfold, *supra* note 131; IRIN, *Justice Costs: The Price of Healing*, in JUSTICE FOR A LAWLESS WORLD? RIGHTS AND RECONCILIATION IN A NEW ERA OF INTERNATIONAL LAW, Pt. 1, at 23, 24 (2006), <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59464>.

296. See DOMAC REPORT, *supra* note 278, at 5 (noting that the group of those walking free includes “fairly senior mid-level commanders who perpetrated some of the war’s worst atrocities”).



The permanent International Criminal Court does not have retroactive jurisdiction over the country's conflict since its statute entered into force on July 1, 2002—well after the Sierra Leonean war ended.<sup>297</sup> Given the lack of any serious capacity and willingness on the part of the current government to prosecute others who are alleged to have carried out atrocities, partially because of the controversial 1999 Lomé Accord amnesty, it seems that an impunity gap will be left unattended in Sierra Leone. This will likely undermine the presumed deterrent effect of the Court, and the perception of its positive contribution to the nation's post-conflict dispensation.

Second, while I concluded that SCSL trials generally conformed to international standards of justice, fairness, and due process of law, I have showed that the lack of stable funding severely hampered the work of the Court. Crucially, among other areas, the lack of a stable source of funds manifested itself in the form of limited institutional and budgetary support for the Defense Office and, more importantly, the defense counsel. Despite the best efforts of committed and fair-minded judges and other professionals throughout the institution, there persisted a general if not gross inequality between the Prosecution and the Defense until the completion of the Freetown trials. Going forward, the major lesson to be drawn from the SCSL experience is that international criminal tribunals should never be forced to rely primarily on voluntary donations to sustain their work; it is a form of cancer that spreads throughout the body and eventually affects each part of the institution.

Though funding issues regrettably impacted the quality of defense mounted, it cannot be said to have tarnished the overarching fairness of the main trials conducted in Freetown to the point of calling them kangaroo or show trials. That would be a gross exaggeration. In addition, and importantly, this concern does not arise in the important Taylor case currently taking place in The Hague. In fact, after serious initial hiccups which threatened to derail the case in June 2007, that trial has become the model of fairness in the manner in which the accused and the defense counsel have been treated by the Court. With the provision of adequate funding and a carefully selected group of experienced criminal defense

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297. Rome Statute of the International Criminal Court, art. 11(1), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). Sierra Leone signed the Rome Statute on October 17, 1998, and ratified it on September 15, 2000. UNITED NATIONS TREATY COLLECTION, STATUS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 3 (2010), available at [http://treaties.un.org/doc/Publication/MTDSG/Volume II/Chapter XVIII/XXVIII-10.en.pdf](http://treaties.un.org/doc/Publication/MTDSG/Volume%II/Chapter%XXVIII/XXVIII-10.en.pdf).

attorneys,<sup>298</sup> it is not surprising that the case has become probably the smoothest running trial of a former head of state in modern international criminal tribunal history.

Finally, in terms of whether the SCSL has contributed to the achievement of peace, as the United Nations and Sierra Leone envisioned when they created it, I have argued that it has—even if this proposition is hard to prove causally. The analysis also showed that the Court's contribution to national reconciliation is debatable, to the extent that it can be assessed this early after the war's end. If anything, the SCSL appears to have hurt efforts at national reconciliation largely because of prosecutorial decisions relating to the CDF (Norman) Trial. This outcome is regrettable given the goals of the founders to help promote national reconciliation.

The attitude of the Prosecution definitely exacerbated the divisions in Sierra Leone. This is because of a legally correct but politically blind insistence on carrying out equal prosecutions against all the parties to the conflict without regard to their consequences in healing, or worsening, the raw wounds of an ethnically, emotionally, and politically divided nation. As the former Chief of Prosecutions at the Court has observed, prosecutorial discretion ensures a certain amount of independence though it is “also potentially a source of danger that can impair the right to a fair trial and the integrity of the whole international criminal justice system.”<sup>299</sup>

At the end of the day, in order to fulfill the important secondary objective of using criminal trials to contribute to the achievement of reconciliation in other post-conflict settings around the world, greater attention must be paid to national desires in terms of whom to prosecute. Overall, meaningfully integrating nationals into the processes of deciding who to prosecute is critical to the long-term legacy. Though for some national involvement might raise the specter that unfairness may result, it also offers the stronger possibility that national sensibilities could be better accounted for in prosecutorial decisionmaking long before indictments are issued and the trial processes are completed. Otherwise, the lesson of Sierra Leone is that, in future situations, the Nuremberg critique of victor's justice might again resurface in the form of selective prosecutions—no longer only about which side, but rather *whose*

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298. The assigned counsel representing him are Courtenay Griffiths, Q.C. (Lead Counsel); Terry Munyard (Co-Counsel), and Morris Anyah (Co-Counsel). They are assisted by James Supuwood, Silas Chekera, and Logan Hambrick.

299. Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 165 (2005).

*perception* of which side ultimately matters—in the difficult process of apportioning blame to specific individuals for mass atrocity crimes.